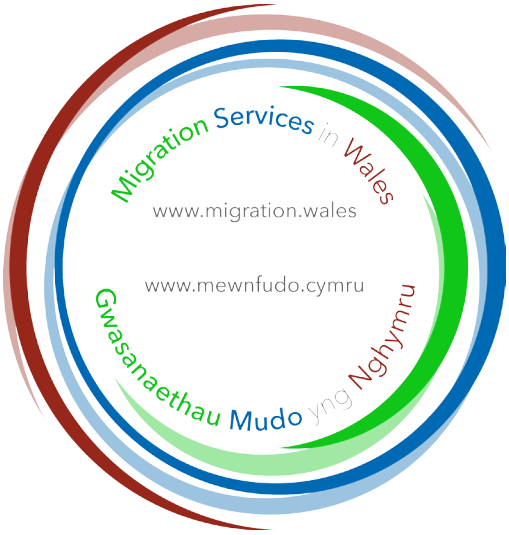

LEGAL & POLICY BRIEFING

The Employment Rights of Migrants in the Welsh Labour Market

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Introduction

This briefing, produced as part of the Migration Services in Wales project, focuses on the employment rights of migrants in the Welsh labour market. The briefing consists of three core sections covering: (i) employment status and eligibility to work; (ii) statutory employment rights; and (iii) protection at work. A separate Migration Trends Report, Migrants in the Welsh labour market, has been produced as part of the Migration Services in Wales project, providing analysis of quantitative data on migrants in the Welsh labour market.

This briefing does not constitute legal advice and does not have statutory status.

Background and context: A brief snapshot of employment rights and statutory bodies in Wales

Workers in the UK can access a range of statutory employment rights dependent on certain eligibility conditions as set out in this briefing. Employment terms that improve upon the minima set by statute may be obtained through collective agreements between employers and trade unions, as well as through contractual terms agreed by employer and worker.

The statutory authorities and services

The National Assembly for Wales is the democratically elected body with specific powers given to it by the UK Government (conferred powers) but excluding the right to legislate in relation to employment, equality, human rights, migration or justice. It does have powers that enable it to take an interest in employment rights, such as its powers with regard to economic development and skills; and, in migration and refugee matters, its powers with respect to equality and communities. It also has specific obligations under the Equality Act 2010 (more below).

The Welsh Government is the devolved government for Wales responsible for proposing and implementing policy and laws which apply in Wales. It supports a programme on growth and sustainable jobs and engages with employers and trade unions in its implementation. Its Strategic Equality Plan for 2012-2016 commits it 'to strengthen and support work with migrants' to improve 'access to advocacy and advice services'. It has produced a comprehensive welcome pack for migrants, Understanding Wales, setting out the welfare and social rights of migrants in Wales. It aims to provide useful information for both workers and employers.

There are a range of statutory bodies operating within Wales that aim to promote rights to equality and protection at work and which include a focus on migration.

The Equality and Human Rights Commission in Wales is the statutory body that works for equality and human rights, for the elimination of discrimination and for the reduction of inequality. Its role is to ensure that GB policymaking reflects the needs of Wales.

The Health and Safety Executive in Wales is the statutory body for health and safety and works to promote safe workplaces in Wales. It works with the Welsh Government and with local authorities in Wales, on matters concerning health and safety in the workplace. It provides advice to employers, as well as to migrant workers.

The Advisory, Conciliation and Arbitration Service in Wales (Acas) is the statutory body responsible for preventing and resolving disputes at work. It provides help and advice for employers and workers and is the first port of call when taking an employment claim to a tribunal. The Acas Pay and Work Rights Helpline is a confidential service that provides help and advice on employment rights.

Job Centre Plus Wales is the UK government agency which assists people into work, by providing a register of available jobs and offering guidance on job applications. Careers Wales is a wholly owned subsidiary of the Welsh Government and provides advice on all aspects of career and career development, as well as on skills and

qualification requirements. Careers Wales is linked to Careers Europe, which offers information on study, work and training opportunities in Europe.

Outside the range of statutory authorities there are other bodies with a focus on migrants (including refugees). The Welsh Refugee Council works with refugees and asylum seekers in Wales and provides support in relation to employment to those recently granted asylum. Migrant Help is a charity that provides support and guidance to those seeking or having obtained asylum.

The system of enforcement

Workers enforce their statutory employment rights through employment tribunals. Appeals from employment tribunals go to the Employment Appeal Tribunal and from there to the Court of Appeal, with a final stage of appeal to the Supreme Court.

The Immigration Bill 2015

Enforcing employment rights means also knowing about immigration law, as in the UK the immigration rules override employment rights. This means that if a migrant is working in breach of their work visa or is working without permission, there is a major and almost insuperable barrier to accessing employment rights. The UK government has stated that measures proposed in the Immigration Bill 2015 aim to place further controls on migration and to tighten the grip on 'rogue' employers that employ migrants who have no legal right to work. The provisions of the Bill include the following:

Employers of migrant workers:

- It introduces a 'migration skills charge' on employers who hire non-EU workers;
- It places a legal obligation on all public authorities to ensure that anyone working in a 'customer-facing role' speaks 'fluent' English;
- For employers who hire workers 'knowingly or having reasonable cause to believe', that they have no right to work, such offence will carry prison term of up to five years (currently it is two years).

Migrant workers:

- It imposes a specific criminal offence of 'illegal working', punishable by imprisonment not exceeding 51 weeks or a fine or both;
- It permits further legal proceedings to confiscate any assets that the worker has, declaring them as 'proceeds of crime'.

Employment status and eligibility to work

For migrants working in the Welsh labour market the first issue to consider is one of employment status, as access to employment rights is determined by the status that a person has. There are two aspects of status, the first being immigration status, as only certain types of immigration status come with a right to work and access to employment rights. The second is employment status, which relates to the conditions under which work is performed. As explained below the legal and contractual status that appertains to the worker determines the range of employment rights that can be relied upon.

Immigration status

An individual may have a right of residence in Wales but this does not automatically provide for a right to work. Immigration status depends on country of origin, type of immigration and work permit. The categories and the work rights attached to them are set out below:

- UK nationals have a right to work anywhere in the UK, although they may still fall into an unlawful work status (see below);
- EU citizens (of any of the 28 EU Member States[1] other than Croatia where restrictions currently apply) have the right to free movement to search for work or to take up employment, as do nationals of Iceland, Liechtenstein, and Norway. There are no restrictions on the kind of work they can do or on where they work. UK employment rights apply to EU citizens;
- Refugees who have 'refugee status', humanitarian protection or discretionary leave to remain may work in the UK without restriction;
- Asylum seekers generally have no right to work. In cases where asylum applications are more than 12 months' old and where the delays are not the asylum seeker's fault, they can be issued with an 'employment permitted' stamp on their asylum application papers which does give a right to work but only in a shortage occupation.

For all others the right to work is dependent on the type of visa permit issued prior to migration:

- Tier 1 permit holders can only work in their own business;
- Tier 2 permit holders can work for a sponsoring employer provided they earn above a minimum level set by the government and also do a second job in the same sector, at the same level, or a job for which there is a shortage of workers, for up to 20 hours a week;
- Tier 3 (system not in operation);
- Tier 4 permit holders are students who may work up to 20 hours a week during term time if studying at or above degree level, and up to 10 hours a week if studying below degree level. During vacation times there is no restriction on hours of work;
- Tier 5 permit holders are young people, aged between 18 and 30, from Australia, Canada, Japan, New Zealand, Monaco and Taiwan who may work in the UK for up to 24 months.

The guidelines for assessing whether someone has a right to work are complex. Employers are obliged to check that all job applicants (including UK and EU citizens) have a right to work. Normally this is done by asking for sight of a passport or other identity document. In March 2015 the UK government began issuing Biometric Residence Permits for nationals from outside the EU. These embed information on the right to work and, as they are rolled out, employers will be required to check them, in addition to national insurance numbers. An employer's guide to acceptable right to work documents, produced by the Home Office, provides guidance to employers on relevant documents while An employer's guide to right to work checks sets out the documents employers need to see, to assess whether a job applicant has a right to work. The Home Office has also produced a short Right to Work Checklist. A Refugee Council short guide for employers sets out rights to work and the documentation required.

A person will have no legal right to work if they: fall outside of the above categories; their permit has expired; they work beyond the scope of the permit; or they have no work permit. The consequences of this status for the statutory employment rights of migrants are detailed below in Table 1.

Table 1 - Migration status and employment rights

Status	Statutory employment rights
Migrants with a legal right to work	Equal access to statutory employment rights subject to the same eligibility requirements as other workers.
Migrants working beyond the permission to work	Normally loss of entitlement to all statutory employment rights (although with some exceptions – see below).
Migrants with no legal right to work	No access to any statutory employment rights.

1. Member states (2015) are: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Gibraltar, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK.

Employment status

The different status of employment contract can also have consequences for an individual's rights to be protected by employment law. This is because UK law differentiates between whether someone is an 'employee' a 'worker' or 'self-employed', with the first category having access to the full range of statutory employment rights, the second category having restricted access and the third having little or no access.

An 'employee' is someone who works under a contract of employment, the latter defined as a 'contract of service or apprenticeship, whether express or implied, and whether oral or in writing'. A 'worker' is someone who works under a contract where there is an obligation to personally perform work and where the work is not performed as a client or customer. Both are defined under Section 230 of the Employment Rights Act 1996 (ERA 96). The tests used, in determining whether someone is an 'employee' or a 'worker' (the tests apply to both), are whether:

- There is a mutual obligation to work and to pay;
- There is a right by the employer (or manager) to control how the work is done;
- The work has to be carried out personally; and
- Contract terms are consistent with the status the individual has.

Both employer and employee/worker have to demonstrate obligations to one another for there to be a contract. Normally this means that the employer has the obligation to provide work and to pay for it, while the employee/worker has the obligation to do at least some work, if it is available. Volunteers, who have the right to refuse to work, are therefore not employees (see Supreme Court in the case of *X v Mid Sussex Citizens Advice Bureau [2012] UKSC 59)*.

Whether someone is an 'employee' or a 'worker' is not always straightforward and often it is a matter of the degree of control which the employer exercises over the individual. The more control over how the work is to be performed the more likely it is that status is that of employee. The courts will normally take account of what the contract itself states and if it states that the individual is not an employee then it will be harder to challenge this and claim employee status. If the contract states that the individual can provide a replacement to do the work then they cannot be an employee but they may still be a 'worker'. In the case of *Autoclenz v Belcher [2011] UKSC* 41 individuals employed by a car cleaning company, had a clause in their contracts which stated that they could provide substitutes (although in practice they never had). The employer tried to argue that they were genuinely self-employed, and therefore excluded from statutory employment rights, but the Supreme Court held that the contracts the workers had signed did not reflect the reality of how they worked and that they were 'workers'. Being defined as an 'employee' has benefits in terms of entitlement to statutory rights. Table 2 shows how contractual status and length of employment determine employment rights, with workers having fewer statutory rights than employees.

Both employees and workers and their employers have obligations in relation to the payment of tax and national insurance. Failure to deduct or pay tax or national insurance can result in the contract being declared 'illegal' which means that statutory employment rights cannot be enforced. It is the duty of employers to deduct the amounts due from the wages of those they employ and forward the amounts to the relevant authorities.

The self-employed

The most significant difference in respect of employment status is between those defined either as 'employees' or 'workers' and those defined as 'self-employed'. Self-employed workers pay national insurance at a different rate (as self-employed) and only have a right to the basic state pension when retired. They have no rights to statutory payments, such as for sickness or maternity or out of work benefits. They should be doing work on their own account, providing their own equipment, able to provide substitutes or choose helpers, and be responsible for their own expenses. To help businesses identify whether or not someone is genuinely self-employed, HM Customs and Excise has produced an Employment status indicator.

Analysing labour market data, Markaki and Vargas-Silva (2015) found that migrants in Wales are slightly less likely than the UK-born in Wales to be self-employed. Migrants are more likely to be offered false contracts which claim to be for self-employment (Clark, 2015). In a growing number of jobs, workers are told that offers of work are dependent on accepting self-employed status. Indeed Anderson et al., in their study 'Fair employment'

Agency workers

Evidence suggests that migrant workers are more likely to find work through employment agencies (Markova and McKay, 2008; Lever and Milbourne, 2015). Those working through or for employment agencies have a complex legal status. They may be 'employees' (if employed directly by the agency but assigned to work in other workplaces); 'workers', if working through the agency but under the control of the end user employer; or 'self-employed' where the agency purely sources work without any further involvement.

Agency workers who are temporarily assigned to work for an end user employer (the employer for whom the work is done) have the right to be treated the same or no less favourably as those directly employed by the end user. They have some rights from day one and others after 12 weeks (see Table 2). If however, they are employees of the agency they have rights as its employees but not the right to the same or no less favourable treatment, as those directly employed by the end user. However, if they are working permanently for the agency, they must be paid between temporary work assignments. Although agency workers normally have no right to claim unfair dismissal (see Table 2), if dismissed for asserting a right as an agency worker, they can take an unfair dismissal claim even if they have not worked for the employer for two years.

The law does not permit employment agencies to charge workers fees to find work (although of course they do charge employers). Agencies can no longer advertise jobs outside the UK if they do not also advertise them in the UK.

Labour providers are covered by the Gangmasters' Licencing Scheme and must have a gangmasters' licence to operate if based on any of the following sectors:

- Agriculture,
- Horticulture,
- Forestry,
- Fish processing,
- Gathering shellfish,
- Dairy farming; and the
- Packaging or processing of food and drink products sectors

The licence is issued by the Gangmasters' Licencing Authority which is responsible for ensuring that employment rights are respected by the labour provider.

Zero hours contracts

More than one million people in the UK are employed under 'zero hours' contracts' (Office for National Statistics, September 2015). The Advisory service ACAS defines zero hours contracts as contracts where the employer is not obliged to provide any minimum working hours and the worker is not obliged to accept any work offered.. Zero hours' contracts have been associated with vulnerability (UK Parliament briefing, 2015) and data suggests that migrant workers are more likely to be employed under them (Office for National Statistics, February 2015). Although zero hours' workers have few statutory employment rights, as a minimum, during periods when they are actually working, they have entitlement to the rights listed in Table 2 where they meet the eligibility requirements. For example the right to the national minimum wage operates from the first day of work and therefore would apply every time work is performed.

Part-time workers
Those working part-time, whether as 'employees' or as 'workers' have the right to be treated no less favourably than comparable full-time employees or workers doing the same or broadly similar work and should have the same entitlements to pensions, training and pro-rata pay. While part-time employees are entitled to claim unfair dismissal after two years' employment (as for all employees – see Table 2), dismissal for asserting part-time rights is automatically unfair and they do not need to have worked for two years to take a claim.

Temporary (fixed-term) employees
Temporary employees working for a fixed period have the right to no less favourable treatment with comparable permanent employees doing the same or broadly similar work but only if their status is that of an 'employee'. They have the right to paid holidays and if working on a series of contracts of four years or more automatically become permanent unless the employer provides a valid reason for further temporary contracts. As with part-time employees, dismissal for asserting temporary employee rights is automatically unfair.

'Illegal' contracts

In UK law there is a well-established doctrine of 'illegality of contract' meaning that individuals cannot benefit from any unlawful act. If workers are to any extent in breach of the law, whether it is immigration, tax and national insurance or contract law, they are deemed to be working under illegal contracts with none of their statutory or contractual terms enforceable. Workers who agree to work without paying tax or national insurance on all or part of their earnings, who under-declare wages or who work without or beyond their permission to work, risk their contracts being declared illegal as the courts generally will not allow workers to benefit from illegality. In the landmark case of *Vakante v Governing Body of Addey and Stanhope School [2005] ICR 23* the Court of Appeal held that where a worker gave the employer false information stating a right to work he did not have, he was barred from taking any claim alleging discrimination. In the case of *Zarkasi v Anindita and anor UKEAT/0400/11/JOJ* an Indonesian woman working without permission brought a series of employment rights' claims to the tribunal. The Employment Appeal Tribunal (EAT) held that the exploitation she had suffered was on the grounds of her undocumented status, making the contract illegal and unenforceable.

There are some rulings that have been more favourable to migrants with irregular status in abusive employment situations but all are specific on their facts and do not detract from the general doctrine of contract illegality. For example, in the case of *San Ling Chinese Medicine Centre v Wei Ji UKEAT/0370/09/ZT*, the EAT held that Wei Ji could still pursue a dismissal claim, even though the wages declared in her contract differed from those that she was paid, as she had not formally participated in the illegality. The Supreme Court (*Hounga v Allen [2014] UKSC 47*) placed further limitations on the doctrine of illegality of contract but in specific circumstances. The claimant was a young Nigerian woman brought to the UK to work as a domestic servant at around age 14. Working conditions were reported to be harsh. She escaped from her employer and made a nationality discrimination claim, arguing that her employers would never have treated a UK national in the way that they had treated her. The Supreme Court noted her conditions of work and ruled that her illegal status was not 'inexorably linked' to the discrimination and that it was possible to separate the illegality of contract from the discriminatory treatment, allowing her to pursue the claim. The case establishes a precedent but only within the very narrow confines of extreme vulnerability. In most cases workers will be barred from taking claims once the doctrine of illegality is raised, even where it is the employer who instigated or encouraged the illegality.

Legal sanctions against employers
The provisions of the Immigration Bill 2015 widen existing legal obligations on employers to prevent illegal work and increase sanctions including of imprisonment.

UK Visas and Immigration has the power to enter the premises of employers believed to employ migrants without the right to work. A Home Office report for Wales and the South West covering January to March 2015 lists employers in Swansea, Newport, Port Talbot, Caernarfon and Aberdare as among those fined.

Employment rights

The aim in this section is to set out the main statutory employment rights. It is not intended to guide anyone through taking or defending a claim at a tribunal and advice should always be sought before so doing, especially since all applicants must now pay a fee up front. Statutory employment laws establish a basic floor of rights, although in some workplaces terms and conditions established by contract or collective agreement will be more generous than those listed in Table 2.

To make a claim to an employment tribunal the worker must first attempt to reach a conciliation agreement with the employer and to do this must contact the advisory service Acas (see above for details), completing an Early Conciliation Notification Form, and, within the first three months of the matter complained of, must seek early conciliation, regardless of the nature of the claim. In the case of *Cranwell v Cullen UKEATPAS/0046/14/SM* the EAT held that even in cases where the employee did not want to have to face (at a conciliation meeting) the employer who had sexually harassed her, she had either to do this or forfeit her right to claim. To proceed to a tribunal there is normally a fee to pay when the claim is presented. The fee to go to a hearing is £490 although, for unfair dismissal, discrimination and whistleblowing cases, it is £1,200 if the case goes all the way to a hearing. The introduction of these fees in 2013, based on a government analysis of the costs of the tribunal service, has resulted in a sharp fall (by more than 65%) in the number of cases going to tribunals (Tribunals statistics 2015).

In Table 2 the column headed 'Eligibility' signposts both the status that individuals (whether employees, workers or agency workers) need and the length of service (the amount of time working for the employer) before the specific employment right is available. Migrants working without permission to work or working beyond permission cannot access any of the rights listed in Table 2.

Table 2 - Statutory employment rights

Statutory employment right	Eligibility	Detais
Written statement of employment terms	Employees and agency workers only; should occur within first 8 weeks of employment	All *employees* have the right to a written statement of employment particulars which must include the names of the employer, date employment began, rates of pay, hours of work and holidays, sickness pay and arrangements, pensions, length of notice and job title, whether the job is permanent or temporary, place of work, disciplinary and grievance procedures and collective agreements if applicable. Where overtime is a requirement it should also be covered in the written statement. While not the contract of employment itself, the statement is normally used as evidence of contract provisions. Where there is a right to a written statement and it is not provided, compensation can be claimed of between two to four weeks' pay if the case is taken to a tribunal, provided it is taken in conjunction with another claim (*Advanced Collection Systems v Gultekin [2015] UKEAT 0377/14/LA*).
Itemised pay statement	Employees only; by first pay date.	*Employees* must be given an itemised pay statement listing gross wages, deductions and net wages and the pay slip must provide reasons for the deduction (*Ridge v HM Land Registry [2014] UKEAT/0098/10/DM*).

Statutory employment right	Eligibility	Detais
National minimum wage	Employees, workers and agency workers; from day 1,	A National Minimum Wage (NMW) applies both to employees and workers but not to the self-employed. The rate is set every October and is currently (2015) £6.70 an hour for those aged 21 or over. 18 to 20yr olds have a lower 'development' rate of £5.30 an hour (2015); 16 and 17yr olds have £3.87 an hour. An apprenticeship rate for those aged 16 to 18 and to others in the first year of apprenticeship is £3.30ph. Tips cannot be included in the calculation of the NMW nor can deductions made by the employer for transport or meals. Time on breaks do not have to be paid at the NMW, however, if a work shift has a requirement that the workers must be on the premises there is still an entitlement to be paid the NMW for those hours. Where the employer provides accommodation the NMW can be reduced by £5.35 a day (£37.45 a week - 2015). If an employer deducts more for accommodation it amounts to an unlawful deduction (see below). Dismissal for claiming the NMW is automatically unfair and the normal 2 year service requirement (see Unfair Dismissal below) does not apply. Workers in agriculture in Wales (where many migrants work) have pay rights set by an Agricultural Advisory Panel, established in 2015 by the Welsh Assembly following abolition of the scheme which had covered England and Wales.
Protection against unlawful pay deductions	Employees, workers and agency workers; from day 1	Employers can only make deductions from wages (other than for tax or national insurance purposes) where there is a contract term that allows for the deduction and in such cases workers must have agreed the deduction before it is made (see also above, in relation to the NMW). If there has been a consistent practice of unauthorised deductions, only up to two years losses can be claimed. If an employer makes a deduction, for example for transport to/from work or for accommodation or for other costs, it must still have been agreed in advance by the worker.
Equal pay	Employees and workers; from day 1	Women and men have the legal right to equal treatment in pay if doing the same or similar jobs or jobs rated as equal. The law covers pay discrimination on gender grounds.
Limits on working hours and right to breaks	Employees and workers; from day 1; agency workers after 12 weeks	The working week should not normally be longer than 48 hours averaged and, although workers can opt out, they cannot be forced to do so. Workers should also be provided with a break from work of at least 20 minutes, if working more than six hours in a day and a break of at least 11 hours between one shift ending and another beginning, together with a weekly rest period of at least 24 hours. For those working nights, shifts should be shorter and breaks longer.
Right to paid holidays	Employees and workers; from day 1; agency workers after 12 weeks	There is a right to 28 days' paid holiday a year (including bank and public holidays), which is pro-rata if part-time and normally taken in the year in which the leave is accrued. The leave can be carried over where sickness prevents someone from taking them in the holiday year. Some workplaces will offer more paid holidays and may tie them to other eligibility requirements.

Statutory employment right	Eligibility	Detais
Protection against discrimination	Employees, workers and agency workers; from day 1	Discrimination (both direct and indirect) on the grounds of sex, race and nationality, religion or belief, sexual orientation, disability, gender reassignment, pregnancy and maternity, age and union membership are all unlawful. Employees also are protected against victimisation for taking a discrimination claim and from harassment.
Sick pay	Employees and agency workers only; from day 1	If sick at least four days in a row, employees will be paid Statutory Sick Pay (SSP) of £88.45 a week (2015). Some contracts will have better arrangements. To get SSP employees must notify the employer that they are sick and if off sick for more than 7 days a 'fit note' must be obtained from the doctor and forwarded to the employer. The DWP has produced guidance for employers on fit notes.
Time off for antenatal care and for adoption appointments	Employees from day 1; agency workers after 12 weeks.	Pregnant employees have the right to reasonable paid time off to attend ante-natal appointments. Their partners have the right to attend up to two appointments. Prospective adopters can have time off for up to five appointments.
Statutory maternity, paternity, parental and adoption leave and pay	Employees only; from day 1. Agency workers have the right to pay but not to the extended leave.	All female employees have the right to up to 52 weeks' statutory maternity leave and - for those who have worked for at least 26 weeks and have been earning at least £112 a week (2015/16) - to statutory maternity pay (SMP) during part of the period of the leave. It is paid at 90% of earnings for six weeks' followed by 33 weeks' at a flat rate of £139.58 (2015-16). There is also entitlement of two weeks' statutory paternity pay (again paid at £139.58) for fathers. Women can also choose to split some of the leave with their partner, although at the flat rate only. There are similar rights to leave for adoptive and intended parents. Dismissal for reasons due to maternity or parental leave is automatically unfair and the normal 2 year service (see Unfair dismissal below) does not apply. Those who do not qualify under the service or earnings qualifications or who are self-employed may have the right to a Statutory Maternity Allowance paid at the flat rate.
Minimum notice before dismissal	Employees only; after 1 month	There is the right to a minimum period of notice before dismissal. This is one week in the first two years of service and increases by an additional week for each year, to a maximum of 12 weeks. Employees must be paid during notice.
Unfair dismissal protection	Employees only; after two years employment	There is a right not to be unfairly dismissed if employed for at least two years. Employees cannot contract out of this right. Dismissal after two years is 'fair' only if it is due to the employee's capability or conduct or for redundancy or to comply with a legal duty, including where proof of a right to work can no longer be provided. Even if dismissing for fair reasons there must be a fair procedure for dismissal.
Redundancy pay and rights	Employees only; after 2 years employment	Where the work has ceased or reduced there is a right to be consulted, to be offered alternative work if it is available or alternatively redundancy compensation amounting to a week's pay (set at a maximum of £475 in 2015, dependent on age) and (dependent on length of service) up to a maximum of 30 weeks' pay. Where there is a selection of employees to be made redundant the selection procedure should be fair and consistent and should not be discriminatory.

Discrimination in the workplace

The right to be protected against discrimination in the workplace and the right to equality of treatment are fundamental rights, encoded in national, European and international legislation. The Equality Act 2010 lists the characteristics (see Table 2) protected by discrimination legislation, making discrimination on any of these grounds unlawful. Migrants can claim discrimination on any of the grounds, in the same way as they might be able to claim on race or nationality. However the Court of Appeal, in the case of *Taiwo v Olaigbe [2014] EWCA Civ 279*, held that mistreatment of a Nigerian domestic worker did not amount to race discrimination, since the treatment was due to her vulnerability as a migrant worker not on the ground of her nationality. The case is to be appealed to the Supreme Court.

The Equality Act 2010 has established a public sector equality duty which places a general duty on all public sector bodies (and private sector bodies performing public functions) to have 'due regard' of the need to eliminate discrimination and advance equality of opportunity and foster good relations between those who share a characteristic and those who do not and covers all of the grounds of discrimination, including their employment functions. Although migration is not specifically mentioned in the duty, legal opinion (Equality and Diversity Forum, briefing for public authorities, 2011) states that just because the immigration rules apply to a person it does not mean that the public sector duty does not apply. There are additional specific statutory duties placed on some public bodies in Wales, that cover the setting of equality plans and assessing their impact, the provision of employment information, staff training and procurement (specific equality duties, Wales).

Protection at work

Research has noted that migrant workers are sometimes more at risk of accident and ill health at work, in particular where they are working in jobs different from those that they initially qualified to do (McKay et al., 2006) and that they are more likely to be working in poorly paid and less well-regulated employment. Furthermore, research has noted that their lack of awareness of employment rights means they are likely to face more risks at work, both to their health and safety and to their general right to job protection (McKay et al., 2006).

There are basic rights to be protected in the workplace. These are:

- The right to health and safety in the workplace; and
- The right to organise and to be represented in the workplace.

This section explains how employment laws provide these forms of protection.

The right to health and safety in the workplace

The Health and Safety at Work etc Act 1974 states that all employees have the right to have their health and safety protected in the workplace and that it is the duty of every employer to 'ensure, so far as is reasonably practicable, the health, safety and welfare at work' of all employees. It imposes duties on both the employer and the employee in relation to health and safety at work, with the Health and Safety at Work etc. Act 1974 enforced by the Health and Safety Executive (http://www.hse.gov.uk/index.htm) and local authorities (http://www.hse.gov.uk/lau/enforcement.htm).

Employers should have a written statement of their health and safety policy and bring it to the attention of their employees. There is a further duty on employers to consult with health and safety representatives to ensure that there are effective measures for health and safety. Information on health and safety and training must be provided in a language that workers can understand. Employers and the self-employed have also a general duty to conduct their businesses to avoid exposing those who are not their employees to risks to health and safety. The combined effect of these duties, both to employees and to the wider public, means that businesses have to have in place mechanisms, both to assess risks and to eliminate or reduce them.

Manufacturers of materials used in workplaces have to ensure (as far as they reasonably can) that the articles they design and construct will be safe for workers to use.

Employees in turn also have duties to the workplace, their colleagues and their employers. They have to take reasonable care for the health and safety of others at work and they must comply with any orders from the employer or other colleagues, intended to promote safe working.

In many workplaces there will be safety representatives whose role is to ensure that the workplace is safe. Safety representatives, who are usually trade union members in workplaces where there is a trade union, have statutory protection from being victimised by their employer, if connected to their safety representative duties.

The right to representation at work

The status and duties of trade unions are regulated under the Trade Union and Labour Relations (Consolidated) Act 1992. The 1992 Act also provides for a right to join a trade union and take part in its activities. It is unlawful and automatically unfair to dismiss or unfairly treat a worker on trade union membership grounds. It is also unlawful for employers to keep lists of union members or activists and to use these lists to bar people from obtaining work. Trade unions seek to recruit and organise workers, including migrants and some have specific recruitment campaigns that focus on migrant workers. In Demir v Turkey [2009] IRLR 766 the European Court of Human Rights ruled that the right to collective bargaining was an essential element of the right to join a trade union.

Union representation in workplaces depends on there being an agreement for union recognition for collective bargaining between the trade union and the employer. Trade unions generally can only bargain with employers where they are recognised. There is a statutory procedure which unions can use when they are seeking recognition. Recognised unions will meet and negotiate with the employer, will appoint workplace representatives to represent members in the workplace and will have a system in place for the training of members and representatives.
In recognised workplaces there will be systems of regular consultation between management and union representatives. Where the union is not recognised, workers can organise to achieve recognition which is generally obtained when membership is relatively high, with the union being able to demonstrate that it represents a majority. However, even if there is no trade union representation in the workplace, employees, workers and agency workers have the right to be accompanied to disciplinary and grievance hearings by a full-time trade union official, a local representative or a co-worker. This means that workers should never have to face disciplinary charges without some form of representation.

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Further resources

Many of the organisations named in this briefing will provide information, advice and sometimes support in relation to employment and migration. These include:

The Commission in Wales: Block 1, Spur D, Government Buildings, St Agnes Road, Cardiff CF14 4YJ; Telephone 02920 447710 (non helpline calls only.)

The Health and Safety Executive in Wales: Government Buildings, Phase 1, Ty Glas, Llanishen, Cardiff F14 5SH: Fax: 029 2026 3120

The Advisory, Conciliation and Arbitration Service (ACAS) in Wales: 2 Dumballs Road, Cardiff CF10 5BF; Telephone: 0300 123 1100

The Welsh Refugee Council: http://www.welshrefugeecouncil.org/; Telephone: 02920489800

Wales Strategic Migration Partnership: Local Government House, Drake Walk, Cardiff/Caerdydd CF10 4LG; Telephone: 02920 468635

Migrant Help: Charlton House, Dour St, Dover, Kent CT16 1AT; Telephone: 01304 218700

The Welsh TUC: Unite House, 1 Cathedral Road, Cardiff CF11 9SD; Telephone: 029 2034 7010

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Migration Services in Wales

Funded by Welsh Government, Migration Services in Wales is a project led by the Welsh Refugee Council in partnership with COMPAS that aims to increase understanding of migration policy and practice in Wales, and to support and facilitate the development of a 'strategic approach' to migration in Wales, one that will ensure relevant stakeholders are able to access detailed and up-to-date information.

The Migration Observatory

Based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford, the Migration Observatory provides independent, authoritative, evidence-based analysis of data on migration and migrants in the UK, to inform media, public and policy debates, and to generate high quality research on international migration and public policy issues. The Observatory's analysis involves experts from a wide range of disciplines and departments at the University of Oxford.

COMPAS

The Migration Observatory is based at the ESRC Centre on Migration, Policy and Society (COMPAS) at the University of Oxford. The mission of COMPAS is to conduct high quality research in order to develop theory and knowledge, inform policy-making and public debate, and engage users of research within the field of migration.
www.compas.ox.ac.uk

Welsh Refugee Council

The Welsh Refugee Council has over 25 years' experience working with refugees and asylum seekers in Wales. It aims to ensure that Wales is a place of welcome through the delivery of specialist services in Cardiff, Wrexham, Newport and Swansea and by influencing policy and practice to improve the lives of migrants across Wales.

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