

Employment in the power and renewable energy sector: Q&A

by *Martin Luff, Vinson & Elkins*

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A Q&A guide to employment issues in the power and renewable energy sector.

The Q&A gives a high level overview of the issues affecting employment arrangements in the sector and the key considerations for employers and employees. It covers employee and consultant contracts; intellectual property rights; compensation and benefits; regulatory and compliance issues; working time and leave; international movement of workers and the likely impact of Brexit. The Q&A also provides a summary of recent employment case law affecting the power and renewables sector.

Types of worker

1a. Excluding generic employment issues, what are the key sector-specific issues that arise in relation to employment and other worker relationships in the power and renewable energy sector?

Employee issues

The power and renewable energy sector engages employees and workers in a wide variety of roles, from blue collar field workers to highly trained engineers. The profile of a workforce will depend on the specific type of business that the employer engages in. For example, wind and solar businesses involve a significant proportion of the workforce engaged in the installation and maintenance of turbines and solar panels, while other types of power generation (such as gas and nuclear) tend to involve larger numbers of employees concentrated at centralised power plants. Unionisation is common in certain parts of this sector that are well-established (such as nuclear) but less common in newer industries (such as renewables).

Other worker relationships

Although many power and renewable energy sector businesses employ large numbers of individuals directly, the workforce engaged in any particular project is also likely to be made up of independent contractors as well as employees of joint venture partners or third party service providers. The scale and complexity of the operations in this sector means that almost all types of worker relationships are present.

Issues affecting other working relationships

The cyclical nature of the industry (which is often driven by commodity prices and demand, and geopolitical considerations) as well as regulatory and political influences (for example, the availability of subsidies or incentives from the government), means that certain businesses seek to structure their workforces in a way that preserves

flexibility. Outsourcing services to third parties rather than performing them in-house through their own employees is one way in which businesses seek to do that.

1b. What are the key issues that arise in relation to self-employed relationships in the power and renewable energy sector?

As is the case with many industries, businesses in the power and renewable energy sector often engage individuals on a self-employed basis in both blue collar and white collar roles, and care needs to be taken to ensure that those individuals are properly classified.

Contracts of employment and consultancy agreements

2. Are there any sector-specific changes that you would make to a generic employment contract in the power and renewable energy sector?

Depending on the particular role, a contract may need to be adapted to include specific terms which are necessary to address issues that are common in this industry, such as:

- Regular changes in location of work (which is particularly relevant for offshore workers, such as those on wind farm projects). For more information, see [Practice note, Changing terms of employment](#).
- Hours of work (many plants and projects run on a 24-hour basis with workers engaged in a variety of shift and rotational patterns). For more information, see [Practice note, Working Time Regulations: overview](#).
- Restrictive covenants to protect valuable trade secrets and intellectual property, particularly for those employees engaged in research and development. For more information, see [Practice note, Restrictive covenants in employment contracts](#).

3. Are there any sector-specific changes that you would make to a generic consultancy agreement in the power and renewable energy sector?

A consultancy agreement would need to be tailored to the particular services being provided. Particular attention should be paid to intellectual property provisions (especially for those consultants working in engineering or highly technical areas). For more information, see [Standard clause, Intellectual property clause in a consultancy agreement with an individual or service company](#).

4. Do any sector-specific considerations apply to the assignment of intellectual property rights (IPRs) in the power and renewable energy sector?

Assignment of IPR to employees

The highly competitive nature of the power and renewable energy sector means that businesses carefully guard their trade secrets and IPRs. Employers must take care to ensure that the employees they hire do not improperly use the IPRs of their previous employers, and that when working on joint venture projects IPRs are assigned appropriately between the joint venture partners. Carefully drafted IPR and non-disclosure agreements are critical.

Assignment of IPR to consultants and other workers

Given the size of the workforces that usually work on power and renewable energy plants and projects, there are often significant numbers of individuals engaged in a non-employment capacity. It is not unusual for such individuals to be in roles that create valuable IPRs. Therefore, care needs to be taken to ensure that the applicable contracts include robust IPR assignment clauses.

Compensation and benefits

5. Do any sector-specific considerations apply to compensation in the power and renewable energy sector? What about benefits?

Workers in the power and renewable energy sector are generally well paid compared to other industries, including blue collar workers, due to the level of skills required for many positions. There are some remuneration and benefit structures that have been more common in the power and renewable energy sector because of the way in which it operates, such as premium, shift and overtime pay.

Regulatory landscape

6. Are there any statutory or regulatory considerations that have a particular impact on employees, workers or the self-employed in the power and renewable energy sector?

There are a number of regulatory authorities that oversee the domestic power and renewable energy industry (such as Ofgem), but these authorities are focused principally on matters unrelated to employees, workers and consultants. However, one of the key areas affecting individuals is health and safety, where injuries to workers and employees are subject to close scrutiny and there is potential exposure to significant liabilities. As a result, employers need to have well-developed whistleblowing procedures which are implemented effectively, particularly as they relate to health and safety and environmental matters.

Policies and procedures

7. What, if any, sector-specific policies, procedures and considerations apply to staff handbooks in the power and renewable energy sector?

Policies relating to hours of work and shift or rotational work are often included and tailored to a particular business's needs. Health and safety, environmental and whistleblowing policies are also given significant attention. For more information, see [Practice note, Effective whistleblowing policies](#).

8. Are there sector-specific anti-bribery, modern slavery and other compliance and enforcement issues in the power and renewable energy sector?

Anti-bribery and corruption

The nature of the power and renewable energy industry means that businesses may have supply chains with products originating from jurisdictions that are prone to bribery and corruption (such as the metals needed in the production of solar panels). Because of this, as well as the high value of many contracts, employers are acutely aware of the need to implement and enforce detailed anti-bribery and corruption policies and internal reporting systems, including through training of their employees. Ensuring that these policies are up to date is a critical part of the compliance process. For more information, see [Practice note, Bribery Act 2010: anti-corruption policies](#).

Modern slavery

Global supply chains and operations in countries that have significant exposure to modern slavery mean that power and renewable energy companies need to ensure that they understand their reporting obligations under the [Modern Slavery Act 2015](#). Complex multinational corporate structures can require a careful analysis of whether and how certain obligations under the legislation apply but, given the reputational issues involved, some companies in the power and renewable energy sector choose to voluntarily disclose more than they are strictly required to under the law. This is in order to demonstrate their corporate values and their efforts in eradicating modern slavery and human trafficking.

9. Are there any sector-specific obligations or considerations in relation to the handling of employee data or the monitoring of employees in the workplace?

Handling employee data

Employee data is subject to the [General Data Protection Regulation \(\(EU\) 2016/679\)](#) (GDPR). For more information, see [Practice note, The GDPR and Data Protection Act 2018: employer obligations](#). The expanded jurisdictional scope of data protection obligations under the GDPR means that many multinational companies have needed to revisit their processes and policies to ensure compliance. Furthermore, those companies with corporate functions centralised in countries outside the EU, including HR functions, will need to pay particular attention to the restrictions and requirements involving transfers of personal data abroad (for more information, see [Practice note, Cross-border transfers of personal data under the GDPR](#)). Data protection responsibilities could be affected by Brexit (for more information see [Brexit materials: Data protection](#)).

Monitoring

Where health and safety issues are critical to the functioning of certain operations, the use of employee monitoring is more prevalent. The GDPR also applies to employee monitoring (for more information, see [Practice note, Monitoring employees](#)).

10. Are there any sector-specific challenges in relation to working time, leave entitlements or holiday pay in the power and renewable energy sector?

Working time

Many power and renewable energy operations and projects work on a 24/7 basis and therefore present particular challenges to employers in structuring appropriate rotas and shifts for employees, while bearing in mind applicable limits on working time and rest breaks. For more information, see [Practice note, Working Time Regulations: overview](#).

Leave entitlements

Shift-based working requires careful analysis of whether annual leave entitlement needs to be provided in addition to off-shift time, or if an employer can insist on any entitlements under the Working Time Regulations 1998 (*SI 1998/1833*) being taken during on-shift periods. Much will depend on what, if any, restrictions and obligations are imposed on time spent while off-shift. Leave entitlements under the Working Time Regulations could be affected by Brexit (for more information, see [Practice notes, Brexit: implications for employment law in the UK](#) and [Q&A: holiday rights for casual workers, part-time workers, shift workers and other atypical workers](#)).

Holiday pay

As with most other industries, the power and renewable energy sector has needed to grapple with recent developments in the law on holiday pay to determine what remuneration (particularly overtime pay) needs to be included in holiday pay calculations. For more information, see [Practice note, Q&A: Lock, Bear Scotland and other holiday pay cases](#).

11. Are there any sector-specific considerations or procedures relating to whistleblowing that commonly occur in the power and renewable energy sector?

The environmental and health and safety consequences of failures to abide by applicable regulations mean that there is considerable scrutiny of these issues. A company's failure to put in place (and properly implement) appropriate whistleblowing policies can lead to substantial financial liabilities and reputational harm. However, pressure can exist on workers not to blow the whistle where any complaint results in the cessation of production, which can be costly. Ensuring that robust whistleblowing policies exist, and that those policies are supported by management, helps to mitigate such risks. For more information, see [Legal update, Tribunal went too far in adding words to legislation when determining compatibility with human rights \(EAT\)](#). For general information on whistleblowing, see [Practice note, Whistleblower protection](#).

Brexit and immigration

12. What are the specific employment and immigration issues (if any) that have arisen as a result of Brexit in the power and renewable energy sector?

The impact of Brexit is not currently being felt in a significant way by the power and renewable energy sector, but the ability to manage a globally mobile workforce is critical to the industry, which will need to grapple with the

immigration consequences of Brexit like many other multinational businesses. For more information, see [Practice notes, EU Settlement Scheme](#) and [Employing EU nationals](#).

13. What are the main anti-discrimination issues and diversity initiatives in the power and renewable energy sector?

Sex discrimination and gender pay issues have affected the power and renewable energy sector in much the same way as other industries. There are certain parts of the workforces within the sector that have been particularly prone to gender imbalance. Companies have needed to pay close attention to why that is the case and to make sure that there are no directly or indirectly discriminatory hiring practices that are affecting the proportions of male and female employees. For more information, see [Practice note, Discrimination in employment: who is protected and who is liable? Job applicants](#).

Offshore and cross-border

14. Is there much international movement of employees and workers in the power and renewable energy sector?

The skills of employees in the power and renewable energy sector are highly transferrable and, as a result, employees in engineering, technical or specialist roles are globally mobile and may undertake projects around the world. Significant numbers of new manufacturing jobs are also created, involving a mix of local hiring and bringing workers in from other parts of the country or abroad. Multinational businesses in this sector will often assign employees dependent on project needs. Secondments and international assignments can occur at all levels of the workforce. Many such companies have well-developed international assignment policies that consider all aspects of the arrangements, including identifying:

- "Home" and "host" employer entities.
- Tax issues affecting remuneration and benefits (including tax equalisation and other benefits).
- Relocation, expatriate and repatriation benefits.
- Immigration and work permit arrangements.

However, it is often the case that one size does not fit all because of the differences in the laws of the jurisdictions involved. The types of arrangements used are typically driven primarily by immigration and tax requirements, but an employer will also need to understand the local employment law implications of the way in which they choose to engage or assign employees.

15. Is there much engagement of contractors and consultants in overseas jurisdictions in the power and renewable energy sector?

Engagement of contractors and consultants is common, but businesses must take care to ensure that they have classified individuals correctly as non-employees and that they have complied with applicable tax and employment law requirements. In many jurisdictions, the legal test of whether an individual is an employee or an independent contractor depends heavily on the applicable facts and circumstances of the day-to-day relationship of the parties.

Tax

Companies will need to ensure that the individuals they engage are properly classified as independent contractors under applicable tax laws. Otherwise, the company could be liable for a failure to withhold income tax and other employment tax obligations.

Anti-bribery

Anti-bribery laws have a broad reach and companies therefore need to understand the extent to which the actions of individuals they engage as contractors or consultants could trigger liability for the company itself. Appropriate policies and training are critical to managing that risk.

Data protection

The jurisdictional reach of applicable data protection laws will need to be carefully considered for consultants and contractors that work in multiple jurisdictions. The personal data of those employees will also need to be transferred cross-border and, where applicable, appropriate safeguards for that data will need to be put in place.

Visa and work permit requirements

Immigration requirements will often be one of the first issues that need to be considered when engaging a contractor or consultant on an international assignment. If a visa or other work permit is required, a business may need to sponsor that visa application. In some cases, visas are only available to employees and the individual will therefore need to be engaged as an employee for such purposes. Additionally, local content rules (particularly in some countries in Africa) may limit the number of foreigners that can be engaged by a particular entity.

16. Are there any international employment law issues that arise in relation to the power and renewable energy sector?

Tax

One of the principle concerns with sending employees abroad is the risk of unintentionally creating a taxable presence or permanent establishment in the foreign jurisdiction. This risk can be managed by understanding the applicable local tax rules. For example, it might be advisable to create a local entity, to whom the employee's employment is transferred before any work is performed in the foreign country. The other key tax consideration is to make sure that appropriate income and payroll taxes are applied in the country. This may depend on the number of days worked in the country and other factors, but if a local tax liability arises then some or all of that liability might be offset under applicable tax treaties. Ex patriate and foreign assignment arrangements often include tax equalisation policies in order to ensure that individual employees are not worse off as a result of their foreign assignment.

Anti-bribery

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Visa and work permit requirements

Visa and work permit requirements need to be considered at an early stage. This is because of strict requirements and an often lengthy application and approval process. In addition, many countries in which power and renewable energy companies have operations also have local content rules, which limit the number of foreign nationals that can work for a particular employer in the country. This can be a significant issue for large power and renewable energy projects, where the local workforce might not have skilled workers in sufficient numbers.

Due diligence on employment implications of business transactions and closures

Transactions involving power and renewable energy companies can involve a large number of different jurisdictions. Therefore, identifying and managing local counsel efficiently is critical to managing costs and the deal timetable. Many transactions are structured as asset deals in which employment issues may need to be considered in a different manner to the UK regime under the *Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)* (TUPE) (for more information, see [Practice note, TUPE: overview](#)). Some transactions may involve assets with few or no employees attached, while others can involve thousands of employees across multiple jurisdictions. The application of TUPE could change after Brexit (for more information, see [Practice note, Brexit: implications for employment law in the UK](#)):

Global codes of conduct and work policies

There is a growing trend of laws with extra-territorial effect in the areas of corruption, bribery and human rights. These are issues of particular concern in many of the jurisdictions in which power and renewable energy companies operate. Having up-to-date policies, training staff, and carrying out appropriate due diligence and monitoring of local operations and supply chains is critical to managing these risks, which can have significant financial and reputational repercussions.

Data protection

The jurisdictional reach of applicable data protection laws will need to be carefully considered for employees that work in multiple jurisdictions. The personal data of those employees will also need to be transferred cross-border and, where applicable, appropriate safeguards for that data will need to be put in place.

Recent EAT cases in the sector

17. Please identify key recent rulings relating to employment cases in the EAT, High Court and above affecting the power and renewable energy sector in the table below.

Case	Area	Impact
<i>British Gas Trading Ltd v Lock & Anor</i> [2016] EWCA Civ 983	Holiday pay; commission.	An employee who earned results-based commission in addition to his basic salary should have his holiday pay calculated by reference to this total remuneration.
<i>Keppel Seghers UK Ltd v Hinds</i> UKEAT/0019/14/JOJ	Consultants; employment status; protected disclosures.	A consultant providing services on an energy recovery facility construction project was a "worker" under the Employment Rights Act 1996 for the purposes of bringing a claim of having suffered detriment for making a protected disclosure.
<i>Capital Energy Solutions v Arnold</i> UKEAT/0138/14/JOJ	Consultation procedures; protective awards; reasons for redundancy.	An employment judge had erred in making a protective award against an employer for its failure to consult in relation to an employee's redundancy when his fixed-term contract came to an end. The judge had failed to consider whether there had been a mixture of reasons for the employee's dismissal and therefore was a reason personal to an employee, as a result of which there would not be a duty to consult.
<i>Office for Gas and Electricity Markets v Pytel</i> UKEAT/0044/17	Human rights; whistleblowing.	The EAT considered whether a tribunal had correctly approached the question of compatibility between an employee's human rights and a piece of legislation which deprived an employee of bringing a whistleblowing claim. For more information, see Legal update, Tribunal went too far in adding words to legislation when determining compatibility with human rights (EAT) .

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