AaronWallis™
Sales Recruitment

# Contracts of Employment

## Most employment agreements are not contracts at all

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# Introduction

Many business owners quickly discover that there are more laws and more potential legal pitfalls concerning employment than almost any other area of commercial life.

This publication is concerned with contracts of employment but, as you'll discover, few people actually have contracts as such.

The present law in the UK relating to these issues (Employment Rights Act 1996) stems primarily from the *1963 Contracts of Employment Act*. In 1978, unfair dismissal law was consolidated with the *1963 Contracts of Employment Act* and the *1965 Redundancy Payments Act* into the comprehensive *Employment Protection (Consolidation) Act 1978* which was itself repealed and replaced with effect from 22nd August 1996 by the *1996 Consolidation Acts*.

# Written Statements

Employers are legally required to give employees a written statement of certain particulars of their employment within two months of the employee starting work. Although this statement covers what would normally be in a Contract of Employment, it is not actually a contract between the employer and employee.

An employer doesn't have to provide a written *contract* (a statement of particulars is all that is required) to its employees - even if it does issue a contract, it may not necessarily cover all the details of the employment. Most employees in the UK do not have written contracts.

So far as written statements are concerned, employers are obliged to give one to employees in all cases except the following:

- Where continuous employment is less than one month;
- Mariners, being persons employed as masters or seamen on seagoing British ships having gross registered tonnage of 80 tons or more, or skippers or seamen of fishing boats;
- Where an employee is engaged in work wholly or mainly outside Great Britain unless the employee ordinarily works in Great Britain and the work outside Great Britain is for the same employer.

Alternatives to a written statement of particulars can take the form of:

- A written contract of employment, which contains all the terms and conditions legally required.
- Notice given to an employee referring him/her to a document, which is accessible during working hours and which contains all the terms and conditions legally required.

Employees will often call the written statement of terms and conditions their "contract of employment" and it may be the only form of written terms that they hold. Although its status is not that of a contract, the terms will be construed as strong evidence of the terms of the contract. There have been cases, however, where terms contained in a written statement were not conclusively found to be terms of the contract and of course these may be overruled by the implication of the parties' conduct in the matter.

Although it is advisable for employers to ask the employee to sign a copy of the statement to state that they have received it, there have been cases where employers have been criticised for asking the employee to state that he agrees that the terms are the terms of the contract (*Gascol Conversions Ltd v Mercer (1974) IRLR 155*). It's much more difficult for an employer to argue that the terms contained in the statement are not those of the contract as it is he who will have produced the statement and handed it to the employee. The employee, on the other hand, can state that he never agreed to the terms, although he may be seen to have waived any rights to dispute them by having been given a copy of the statement and by continuing to remain in employment without questioning them. Tribunals and courts have applied this particular theory reluctantly as again was shown in the case of Robertson v British Gas. The courts will be particularly reluctant to rule that the employee has allowed a variation, if the term itself was not something which would have had immediate effect upon his day-to-day working life (*Jones v Associated Tunnelling Company Ltd (1981) IRLR 477*).

## What is a "Contract of Employment"?

A contract of employment is an agreement entered into by an employer and an employee under which they have certain mutual obligations.

The contract need not be written (except for a contract of apprenticeship) - the contract terms can be written, oral, implied or a mixture of all three.

Implied terms might include those that are too obvious to be expressly agreed – for example, a term that the employee must accept reasonable instructions from the employer – those that are necessary to make the contract workable and those that are established by custom and practice in the particular organisation or industry concerned.

# Contracts of Employment

The Contract of Employment is one of the most important documents in the employee/employer relationship:

- It establishes the contractual relationship between the employer and employee and provides crucial written evidence in cases taken to an Industrial Tribunal;
- It improves the morale, loyalty and efficiency of a workforce since employees know exactly where they stand;
- It formally establishes the standards required and expected in the employment relationship.

A written statement of particulars can constitute a written contract if that is the intention of both employer and employee - but an employee's signature on the written statement of particulars doesn't convert that written statement into a contract. The distinction is significant: if a contract of employment is written neither party can bring evidence to show that the terms of the contract are inaccurate. However, if the employee has only been given a written statement of particulars then the accuracy of the statement is open to challenge.

# Disputes

If there is a dispute and the employer has not given the employee a contract, the Court may use the terms in the statement instead to decide the terms of employment. Other sources of terms that a Court may say are part of the employment contract are as follows:

- The letter the employer sent offering the job (if one was sent). This often contains important information about the terms of employment and will be useful evidence to an Industrial Tribunal if the job was accepted on the basis of the contents of such a letter;
- Terms agreed between the employer and any Trade Union that represents the workforce. This includes local and national agreements made between employers and Trade Unions;
- Any terms stated in an advertisement for the job;
- The employer's works' rules and staff handbook - this includes rules placed on the staff notice-board by the employer;
- Spoken agreements between the employer and all the employees or individual employees.

# What should be in an Employment Statement? [1]

The employer must include the following terms in an employment statement:

- Names of the Employer and Employee - who the parties to the contract are and the employer's address (the place of work) or if the employee must or is allowed to work at different places, a statement to this effect;
- Date of commencement of continuous employment;
- Pay, including what scale of pay the employee is on and how it is calculated;
- Payment frequency dates - weekly, fortnightly or monthly;
- Hours of work and terms related to hours worked (for example if the employee works shifts or overtime). The Working Time Regulations 1998 must be adhered to;
- Holidays and holiday pay. Employees are entitled to a minimum of 4 weeks annual leave (including public holidays);
- If benefits are included it should be clear whether the benefits are discretionary or contractual;
- Sickness procedure and entitlements;
- Pension Scheme details including whether a contracting out certificate is in force for the purpose of a social security pension;
- Notice period which must be at least the statutory minimum;
- The title of the job and a brief description of the duties involved. There should be a level of flexibility to allow the employer to request alternative or additional duties to be performed as fits the needs of the business.
- Place at which the employee is normally expected to work. A mobility clause may be included if the employer may require the employee to travel or change their workplace;
- Details of work abroad (if longer than 1 month) including the currency in which salary is to be paid, any benefits provided and any terms in relation to the employee's return to the UK;
- The length of the contract (if employment provides for a fixed term contract);

## Can a policy become a contract?

Traditionally policies have been seen as non-contractual, flexible procedures. However in the case of Peries v Wirefast Ltd 2006, the Employment Appeal Tribunal (EAT) decided that it is possible for a policy to give rights to contractual rights over time.

In this case the policy was a redundancy policy and the right was to 12 weeks redeployment pay and other benefits (which was clearly stated in the staff handbook as "this is not part of your contract").

The EAT decided that the policy had become a contractual right through the principle of custom and practice.

Contact us if you need assistance and advice in reviewing your "policies".

## What if you get it wrong?

Confusion can create friction and misunderstandings and may lead to:

- Claims to civil courts, or to industrial tribunals (ITs) for breach of contract
- Claims to ITs for unfair dismissal
- Claims to the courts or ITs for damages for wrongful dismissal if you don't give the requisite notice (where the employee leaves without giving the required notice, you have a similar right to claim damages).

If you impose change, employees could claim damages in the civil courts or resign and claim constructive dismissal at an IT.

- If the terms of work are affected by any collective agreement the details should be included;
- Disciplinary Rules and Complaints Procedure (the person to whom the employee can apply if they wish to raise a grievance or dissatisfaction with disciplinary decisions). Employees must be given details explaining the steps consequent upon such appeal. The Contract should refer to the Employment Act 2002 and to Employment Act 2002 (Dispute Resolution) Regulations 2004.

Optionally, the employer may also include:

- Details of any probationary period;
- A tailor-made restrictive covenant to protect legitimate business interests from departing employees;
- A Confidentiality clause making clear the categories of information regarded by the employer as confidential;
- A Protection of Intellectual Property clause;
- A Garden Leave clause to allow an employer to remove the employee from access to business information whilst preventing them from undertaking competitive activities;
- A clause allowing reasonable changes to be made to the terms of the Contract of Employment.

Note:. If the employer decides to change the employment statement, the employee must be notified of any changes as soon as possible (by law, this must be within 1 month of the change).

# Individual and Collective Contracts

Whilst a contract is always individual, it is usually common to either all employees or groups of employees, for example, manual, white collar, managerial, etc.

A contract of employment which is common to a group of employees may refer to the terms and conditions of employment being negotiated with recognised trade unions, and all changes are collectively agreed with trade unions and apply to all staff in that group. This is referred to as a "collective agreement".

Where trade unions are not recognised for collective bargaining, whilst the terms and conditions of employment may be common to a group of employees, the contract is defined as an "individual" contract, because it is not subject to any collective agreement.

Except for top managerial positions, it is rare for there to be any genuine individual negotiation on terms of the contract. Where a common contract without trade union recognition is involved, it is important to ensure that all terms and conditions are covered, and how changes to those terms can be effected.

An individual contract of employment is an agreement negotiated between an individual employee and an employer, as opposed to a collectively negotiated agreement. Although there is no legal requirement for the contract itself to be in writing, because people's memories are not infallible, it is best to ensure that everything relating to terms and conditions of employment is put in writing as this can minimise later disagreements. If the employer does not put anything in writing, then the employee should write confirming his/her understanding of the terms agreed and retain a copy of the document for future reference. An agreement signed by both parties will carry significant weight if the contract is challenged.

On the previous page, we've provided a list of the terms of an individual contract. So far as collective agreements are concerned, terms that can be added include:

- provision of an equality of opportunity statement;
- career break and extended leave arrangements;
- time off to care for dependants;
- time off for religious observation;
- childcare payment and job-share possibilities.

## Law Changes

With effect from 1 October 2004, employers are obliged to provide employees with a written statement of terms and conditions of employment (sometimes referred to as "written particulars"). Previously, written particulars given to employees (within two months of employment) needed to include a note giving details of any disciplinary rules, together with details of a person to whom the employee should apply if he or she was not satisfied with any disciplinary action taken against him or her. Now, the part of the written particulars dealing with disciplinary and grievance matters must also set out any procedure (including any statutory procedure introduced under the new dispute resolution rules), which applies when an employee is dismissed or disciplined. Alternatively, the written particulars may refer the employee to a document, such as the Employee Handbook, which contains the procedure (although it must be reasonably accessible to the employee).

In addition, there is an obligation on employers to give all employees particulars of any changes to its policies and procedures. The BIS has published a short sample memorandum which employers can use to send to employees to draw their attention to the changes. It is available on the BIS website at: www.bis.gov.uk/er/memo.htm.

If it is found in a tribunal action that (at the date of beginning of proceedings) the employer has failed to give a written statement or provide notification of changes, the tribunal is to award an extra 2 or 4 weeks' pay, unless there are exceptional circumstances making it unjust or inequitable to do so.

**Source: Addleshaw Goddard**

# Fixed Term Employees Regulations

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations come into force on 1 October 2002. They make certain changes to the way fixed-term employees are treated by the law and should be treated by their employers. Their aim is to ensure that fixed-term employees should not be treated less favourably than comparable permanent employees on the grounds they are fixed-term employees, unless this is objectively justified.

The regulations affect fixed term contracts in that from 1 October 2002:

- the use of successive fixed-term contracts will be limited to four years, unless the use of further fixed-term contracts is justified on objective grounds;
- if a fixed-term contract is renewed after the four-year period, it will be treated as a contract for an indefinite period;
- any redundancy waiver that is included in a fixed-term contract which is agreed, extended or renewed after 1 October 2002 will be invalid;
- the end of a task contract that expires when a specific task has been completed or a specific event does or does not happen will be a dismissal in law; and
- employees on fixed-term contracts of three months or less will have a right to statutory sick pay and to payments on medical suspension, guarantee payments and the right to receive and duty to give a week's notice after one month's continuous service.

For further information on the Fixed Term Employee Regulations see our publication *IP474:- Fixed Term Work – Implementing the European Directive.*

# Guidance from ACAS

ACAS, the independent impartial organisation with over 25 years' practical experience of helping both employers and employees work together to build harmonious workplace relationships, offer the following advice on contracts of employment.

## What are the legal requirements?

A contract is a legally binding agreement between you and your employee, which is formed when the employee agrees to work for you for pay. The contract is made up of both oral and written agreements and may include:

- Express terms which are terms explicitly agreed;
- Implied terms which may include:
  - terms that are too obvious to mention (e.g. that the employee will not steal from the employer);
  - those necessary to make the contract workable (eg that a person employed as a driver must have a current driving licence) - though it is often better to write down such terms in any case; and
  - those that are the custom and practice of the industry;
- Terms incorporated into individual contracts by reference to other documents, such as company handbooks or collective agreements with trade unions;
- Terms imposed by law (e.g. the right not to be discriminated against on grounds of race or sex).

You are not required to set out in writing all the terms of the contract but you must provide the employee with written details of his or her main terms and conditions of employment within two months of starting work. The terms and conditions you are required to put in writing are set out in the [2]BIS Booklet Written Statement of Employment Particulars available from most jobcentres.

## Can the contract be changed?

- As a general rule alterations to the contract can be made only with the agreement of both parties either verbally or in writing;
- Changes can also be agreed through collective agreements such as those between employers and employees or their representatives or through a term which provides for a variation in the contract - for example, a clause which requires an employee to carry out a range of duties;
- You should agree changes wherever possible. If you impose change, employees could claim damages in the civil courts or resign and claim constructive dismissal before an industrial tribunal.

### ACAS launches free online Employment Contract training

ACAS has developed a free online learning package to help businesses and organisations understand and put together contracts of employment in the workplace.

Announcing the package on 6 December 2004, John Taylor, the ACAS Chief Executive said: "It makes sense to get the employment contract right at the beginning. This online learning package will help employers to develop appropriate polices and procedures to get it right. Using ACAS good practice will help stop problems developing in the first place."

The course covers topics such as:

- contracts of employment;
- written statements;
- varying a contract of employment;
- understanding contractual issues;
- your employee's rights on pay.

The online learning package is available at www.acas.org.uk/elearning.

Other free online learning packages include discipline and grievance, managing absence, information and consultation and handling redundancies.

## How can a contract be terminated?

A contract can be terminated:

- By mutual agreement or by the employer or employee giving the required notice of termination. There are certain minimum periods of termination (for example, once they have been employed for a month, employees are entitled to one week's notice for the first two years in the job).

## How do I get it right?

- Agree terms and any subsequent changes with employees;
- Issue employees with a written statement setting out the main terms and conditions of their employment within two months of them starting work;
- Remember, if you terminate a contract you must give at least the statutory minimum notice period or the notice period agreed in the contract if this is more;
- Put as much as possible in writing to avoid confusion.

## ACAS Contact Details

**Public Enquiry Points**
Most offices are open from 9.00am till 4.30pm weekdays, some offices may vary.
**Birmingham**: (0121) 456 5856

**Bristol**: (0117) 946 9500

**Cardiff**: (01222) 761126

**Fleet**: (01252) 811868

**Glasgow**: (0141) 204 2677

**Leeds**: (0113) 243 1371

**Liverpool**: (0151) 427 8881

**London**: (0171) 396 5100

**Manchester**: (0161) 228 3222

**Newcastle upon Tyne**: (0191) 261 2191

**Nottingham**: (0115) 969 3355

**Midlands Region**
Warwick House, 6 Highfield Road, Edgbaston, Birmingham B15 3ED
Anderson House, Clinton Avenue, Nottingham NG5 1AW

**Northern Region**
Commerce House, St Alban's Place, Leeds LS2 8HH
Westgate House, Westgate Road, Newcastle upon Tyne NE1 1TJ

**North West Region**
Boulton House, 17-21 Chorlton Street, Manchester M1 3HY
Cressington House, 249 St Mary's Road, Garston, Liverpool L19 0NF

**South and West Region**
Regent House, 27a Regent Street, Clifton, Bristol BS8 4HR
Westminster House, Fleet Road, Fleet, Hants GU13 8PD

**London, Eastern and Southern Areas**
Clifton House, 83-117 Euston Road, London NW1 2RB
39 King Street, Thetford, Norfolk IP24 2AU
Suites 3-5, Business Centre, 1-7 Commercial Road, Paddock Wood, Kent TN12 6EN

**Scotland**
Franborough House, 123-157 Bothwell Street, Glasgow G2 7JR

**Wales**
3 Purbeck House, Lambourne Crescent, Llanishen, Cardiff CF4 5GJ

**Head Office**
Brandon House, 180 Borough High Street, London SE1 1LW

## When is a shareholder an employee?

This vexed question tends to crop when the owners of a company claim a statutory redundancy payment from the DTI following the company's insolvency.

Underhill J. considers a number of conflicting authorities, the best-known of which, Bottrill, poses the question 'who really owns the company?'. He set out his view (as obiter) in Nesbitt v Secretary of State for Trade and Industry that:

*"the fact that a claimant under the employment protection legislation is a majority shareholder and a director of the company which employs him does not affect his status as employee unless the tribunal finds that the company is a 'mere simulacrum' ... (and thus, by the same token, that the contract between it and the putative employee is a sham)"*

The Honourable Justice Underhill allowed the appeal and remitted the claim to the Tribunal for a determination of the sums due.

**Source: Daniel Barnett, Barrister, 1 Temple Gardens, Temple, London, EC4Y 9BB**
www.1templegardens.co.uk and www.danielbarnett.co.uk

## Anti Competition Clauses – A Warning

A Court of Appeal case has highlighted the need to include specific provision in an employee's contract of employment prohibiting the employee from competing or preparing to compete during their employment.

In the case of Helmet Integrated Systems v Tunnard 2006, Tunnard was employed by Helmet Integrated Systems (HIS) as a salesman of protective equipment. During his employment he developed a plan for a new type of safety helmet. When one of HIS's competitors invested in Tunnard's project, Tunnard left HIS.

HIS claimed breach of contract on the basis that Tunnard's job description stated that he was required to disclose any "competitor activity". They also argued that Tunnard had a fiduciary duty to act solely in HIS's interests.

The Court of Appeal decided that as Tunnard was employed as a salesman rather than a designer, his actions were not caught by the "competitor activity" clause.

The Court of Appeal held that specific provision must be made in the relevant contract to cover such circumstances successfully.

The case can be viewed at: www.bailii.org/ew/cases/EWCA/Civ/2006/1735.html

# Employer's Responsibilities

The following list, sourced from Business Link[3], reminds employers of their obligations towards their employees:

- Employers must take recruitment decisions in a fair and non-discriminatory way;
- Employers must check the eligibility of new staff to live and work in the UK;
- Employers must give employees a written statement of employment particulars within two months of their starting work;
- Employees' tax and NI contributions must be deducted from wages and paid to HMRC;
- Pay rates must comply with the National Minimum Wage regulations;
- Employees must be provided with itemised pay statements;
- Employers must not make unauthorised deductions from workers' wages;
- Employers must pay statutory sick pay to all qualifying employees from the fourth day of incapacity onwards;
- Employers with five or more employees should establish whether they have an obligation to offer employees access to a stakeholder pension scheme;
- Employers must give workers a minimum of 24 days paid annual leave a year (reduced pro rata for those working part time);
- Employers must not ask workers to work an average of more than 48 hours a week unless they have given their voluntary consent in writing;
- Employers must provide correct daily and weekly rest periods;
- Employers must give employees time off work in specified circumstances other than annual leave (e.g. to deal with an emergency involving a dependant, or for antenatal appointments);
- Employers must give serious consideration to requests from certain employees (e.g. parents of children under six and carers of adults) to work flexibly;
- Employers must ensure that entitlements to maternity, paternity and adoption leave and pay (including unpaid leave) are correctly calculated and given;
- Employers must ensure that changes to employment contracts are discussed and agreed with employees or, where there is a collective agreement, with their representatives;
- Part-time workers must be treated no less favourably than their full-time equivalents, and fixed-term workers must be treated no less favourably than permanent workers;
- Employers must ensure that work of equal value gets paid at equal rates;
- Employers must not treat any workers less favourably because of their race, nationality, ethnic grouping, sex (e.g. in connection with maternity), disability, age, sexual orientation, religion or philosophical belief, membership or non-membership of a trade union or their marital status. This requirement must be met at every stage of employment including recruitment, promotion and dismissal;
- Employers must be prepared to make reasonable adjustments to enable people with disabilities to work;
- Employers must provide workers with a secure, safe and healthy working environment. A health and safety policy must be in place, and be in written form if there are five or more employees;
- Employers must ensure that valid employer liability insurance cover is in force at all times;
- Employers must ensure that disciplinary and grievance procedures that comply with minimum statutory requirements are implemented, and are specified in the statement of employment particulars;
- Employers must ensure that any dismissals are not unlawful or unfair;
- Employers must ensure that employees who are dismissed are given the correct notice period. Where redundancy applies, employees must be given the correct level of redundancy pay.

***"The distinction about written terms is significant"***

By law, all employees (irrespective of how many hours they work) are entitled to a written statement of their terms and conditions within two months of starting work.

One of the best ways to comply with this is to provide a contract of employment because it gives both sides the opportunity to set down in writing the whole basis of the working relationship.

# Further Information

This guide is for general interest - it is always essential to take advice on specific issues. We believe that the facts are correct as at the date of publication, but there may be certain errors and omissions for which we cannot be responsible.

If you would like to receive further information about this subject or other publications, please call us – see our contact details on the next page.


## Acknowledgement

[1] This section has been based on a document entitled "Focus on Employment Contracts" provided by Rohan & Co Solicitors. They can be contacted at Aviation House, 1-7 Sussex Road, Haywards Heath, West Sussex RH16 4DZ or on 01444 450901.

[2] The Department for Business, Innovation & Skills (BIS) was formerly known as the Department for Business, Enterprise and Regulatory Reform (BERR) and before that was called the Department for Trade & Industry (DTI).

[3] Crown copyright is acknowledged.





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