Terms and conditions of employment

Member resource

The law is stated as at 17 June 2009
Please click on the individual questions below to see the answers.

- **What legislation governs terms and conditions of employment?**

The main piece of legislation which governs terms and conditions of employment is the Employment Rights Act 1996.

Other legislation which has an impact on what can be incorporated into the terms and conditions of employment or their subsequent variation includes:

- Equal Pay Act 1970
- National Minimum Wage Act 1998
- Pensions Schemes Act 1993
- Working Time Regulations 1998 (SI 1998/1833)
- Employment Act 2002
- Information and Consultation of Employees Regulations 2004 (SI 2004/3426

- **Do all employees need written contracts?**

It is best practice to have written contracts and most employers do. However, it is not compulsory for employees to have their entire contract in written form. A contract of employment is a legally binding agreement between an employer and an employee which may be oral and/or in writing.

Although contracts of employment do not have to be in writing, under section 1 of the Employment Rights Act 1996, certain particulars do have to be put into writing within two months of the start of the contract. This 'written statement of employment particulars' advises the employee of the more important aspects of the terms of employment. There is no small-employer exclusion in relation to this requirement to provide a written statement.

The strict legal position is that the statutory written statement of particulars is not itself a contract. However it is certainly evidence of it. The fact that the employer asserts that this statement properly reflects the contractual terms is not the final decision on what the terms of the contract are; the employee may still disagree. However the tribunal may decide that the statement does reflect the terms as the Employment Appeal Tribunal did for example in *Parker v Northumbrian Water Ltd (unreported, EAT/0609/07 12 May 2008, EAT*).

- **Are provisions in staff handbooks part of an employee's written contract?**

Some provisions in a staff handbook will be part of an employee's written contract and some will not. It is common for contracts of employment to contain reference to some other document including a staff handbook which will contain express contractual terms together with those in the contract itself.

An employer should make clear if the handbook does form part of the contract and, if so, which parts are intended to have contractual effect and which parts are mere expressions of policy.
The parts of the handbook which are to have contractual effect should be brought to the employee's attention before the employment relationship starts. An employer should also include a clause in the employment contract in which the employee confirms that:

- they have been provided with a copy of the handbook,
- the handbook includes various policies, for example the discipline and grievance procedures, the equal opportunities policy, the internet and communications policy, and the health and safety Policy,
- they have read and accept any terms and conditions of employment stated in the provisions of the handbook.

A case concerning provisions in a staff handbook becoming part of the contractual terms was *Harlow v Artemis International Corporation Ltd [2008] IRLR 629, HC*. In this case an enhanced redundancy policy in a staff handbook was regarded as an express contractual term (although the employer denied this) and the employee was entitled to the enhanced payment. As it had been the employer's policy over the years to make enhanced redundancy payments there was also an implied contract term relating to the enhanced payment.

- **Can an employer withdraw a job offer?**

The normal rules of contract apply to the preliminary stages leading to the creation of an employment contract. The basic position is that an employer may withdraw a job offer at any time before it is accepted by the employee. However if the reason for withdrawal of an offer is discriminatory then the employer may be exposed to a discrimination claim. The issues which may arise concerning job offers are dealt with under separate headings below:

Verbal job offer

A contract may be formed even at the interview stage if an employer makes a binding unconditional offer of employment which is clearly accepted by the employee. In this case if the employer subsequently attempts to withdraw the offer the employee will be able to sue for breach of contract.

Written job offer

More commonly an employer will make a written offer of employment.

- If this is an **unconditional** offer, a contract of employment exists between the employee and the new employer from the moment the employee accepts it. Once an unconditional offer has been accepted if the employer attempts to withdraw it, the employee can claim for compensation for breach of contract which may include payment for a notice period and compensation for giving up their old job.
- If a job offer is **conditional**, for example subject to checking satisfactory qualifications, references or a medical examination, then the employer may be able to withdraw the job offer. If the references, for example, are unsatisfactory, then the employer will be able to withdraw the offer and the employee will not be able to claim compensation.

Discrimination

If a job offer is withdrawn for discriminatory reasons then the employer may be exposed to a discrimination claim. For example, a prospective employee alleged breach of the duty to make reasonable adjustments under

the Disability Discrimination Act 1995 when his offer of employment was withdrawn because it proved difficult to secure personal assistance for the applicant's care needs. (See the case of *Kenny v Hampshire Constabulary [1999] ICR 27, EAT*.)

Also see the question on compensation when an employer goes back on offering a new employment contract in our Wrongful dismissal FAQ.

- Go to FAQ

- **What should be in the written statement of employment particulars?**

The following should be supplied in the written statement:

- Names of the employer and employee.
- Date when the employment began.
- Date when the employee's period of continuous employment began (taking into account any employment with a previous employer that counts towards that period).
- Job title or a brief description of the work for which the employee has been hired.
- Remuneration details, including pay scale or rate information, timing of payment (this could be daily, weekly, monthly for example) and the method of payment.
- Terms and conditions relating to hours of work and the normal working hours.
- Terms and conditions relating to holiday entitlement including bank holidays.
- The employee's place of work or, where the employee is required or permitted to work at various places, an indication of this requirement plus details of the employer's address.

The following should also be supplied within two months of commencement, either in the written statement or in an accompanying document:

- Terms and conditions relating to incapacity for work due to sickness or injury, and details of sick pay provisions (including statutory and any company sickness scheme).
- Details of pensions and pension schemes (see also the section on pensions below).
- Details of period of notice to be given by the employer and the employee.
- The period for which any non-permanent employment is expected to continue or, if it is for a fixed term, the date when it is to end.
- Details of any collective agreements which directly affect the terms and conditions of employment, irrespective of whether the employee is party to these agreements.
- Where an employee is required to work outside the UK for more than one month, details of:
  - length of time
  - what currency the salary will be paid in
  - additional remuneration and benefits relating to the posting outside the UK (eg flights home, schooling)
  - terms and conditions for returning to work in the UK.
- Details of any procedure relating to dismissal, or the procedure applicable to the taking of disciplinary decisions.
- Specific details of the person to apply to if seeking redress for any grievance and the manner in which such an application should be made.

These are bare minimum requirements primarily to protect the employee. Prudent employers will have additional provisions in their written contracts which reflect the needs of their business, for example, appropriate restrictive covenants. (Small employers are no longer exempt, so all employers must supply these particulars even if they only have one employee).

Further details of the minimum information required are available on the Department for Business, Enterprise and Regulatory Reform (BERR) website.

- Go to BERR website

(The *CIPD Policies and Procedures for People Managers* manual has an example contract and a range a range of optional clauses.)

- Go to CIPD Policies and Procedures for People Managers

- **What happens if employers do not provide a written statement of employment particulars?**

If the employee requests the written statement and it is not provided, this may lead to an application to an employment tribunal who may:

- determine what the written particulars were from the surrounding facts, and
- award compensation* which will be at a level of either two or four weeks pay up to the current statutory maximum.

*The further compensation is a dependent right and can only be claimed if another claim, for example, unfair dismissal is also being pursued in the tribunal.

An example of a tribunal's power to determine what the written particulars ought to have been comes from *O2 (UK) Ltd v Wallace, (unreported, [2008] EATS/ 0050/07/17/06 17 June 2008, EAT)*. This case confirmed that the tribunal does not have any power to decide what, in the tribunal's view, the parties should have agreed. All the tribunal can do is determine, if it can, the whole of the parties' agreement on the matter.

- **What else do employers have to consider in drafting terms and conditions of employment?**

It is extremely important to ensure that none of the terms and conditions are directly or indirectly discriminatory on grounds of age, sex, race, national origins, ethnic origins, sexual orientation, religion or belief.

Specific examples of other matters to take into account which are over and above the bare minimum include:

- complying with the Working Time Regulations 1998
- complying with the National Minimum Wage Act 1998
- complying with the Pensions Schemes Act 1993
- protecting intellectual property including complying with the Patents Act 1977
- observing the Equal Pay Act 1970
- including probationary periods
- including suspension clause
- defining gross misconduct
- contractual/statutory maternity, paternity, adoption leave and pay
- arrangements for flexible working
- reporting sickness absence
- agreement to undergo medical examination
- health and safety provisions
- business travel and expenses, including use of private car
- confidentiality and data protection
- pay in lieu of notice
- restrictive covenants
- garden leave
- provisions restricting Internet and e-mail use.

- **Is it legally possible to vary employees' contractual terms?**

The short answer to this question is that it is usually only legally possible to vary employees' contractual terms with their consent. However there are various ways changes may be achieved.

First, consider whether the proposed change is contractual or whether it is merely a change in policy. Policy changes may be implemented without the need to obtain agreement from the employees. If the change is contractual, then agreement will be needed to implement the change. Unilateral changes are unenforceable and usually a breach of contract exposing employers to a claim against them.

There are a number of options to try to achieve change:

1. Consult with the employees and hope they will agree voluntarily.

- Explain the proposed changes to the employees.
- Discuss the reasons behind the change.
- Explain what will happen if the changes do not occur, for example, loss of a major contract.
- Give employees the opportunity to raise their concerns and put forward their suggestions.

2. Offer an incentive to employees to agree, for example, a one-off cash payment. Some employers find that employees willingly agree to changes shortly before the time of their annual pay review.

3. If the employees will not agree to the change the employer may have to impose the change. However, this option should only be used as a last resort. If the change is fundamental, it may amount to a breach of contract entitling the employees to:

- resign and claim constructive unfair dismissal
- continue to work but make it clear that they object to the change
- claim breach of contract and damages for loss
- make an unlawful deduction of wages claim, if the change results in a reduction of pay.

If an employee continues to work under protest whilst objecting to the changes, the employer may be able to enforce the varied terms. For example in *Robinson v Tescom Corporation [2008] IRLR 408, EAT* the area the employee had to cover was increased. He agreed to the new terms under protest and then subsequently wanted to return to his ‘old job’. He was dismissed for insubordination. It was held that the contract continued incorporating the varied terms and that employer could dismiss him for failing to comply and cover the increased area. There was no unfair dismissal. Although in other cases, the employee may preserve the right to resign on the basis of a constructive unfair dismissal if the employer insists on enforcing more fundamental changes.

4. Bring the original contracts to an end by contractual notice and then immediately re-engage on the new terms and conditions. Again, this is not without risk. By bringing the contract to an end an employer is in effect dismissing the employees and must therefore be able to justify their decision on the basis of some other substantial reason. In assessing whether a dismissal is fair the tribunal assess:

- presence of a sound business reason for effecting the change
- any alternatives
- the proportion of the workforce who were willing to accept the change
- the impact on the particular employees and their reasons for not agreeing to the change and whether or not there was adequate consultation.

Any variation should be recorded in writing within one month of the change in order to comply with the Employment Rights Act 1996. If the employees agree to the change, they should be asked to confirm their

agreement by signing a document recording the variation. The signed document should then be appended to the contract of employment.

- **Does demotion amount to a unilateral variation of contractual terms?**

Yes. Demotion from one post to another will almost always be capable of being a repudiatory breach of contract entitling the employee to claim:

- breach of contract, and
- unlawful deduction from wages (if there is a reduction in salary), and
- constructive unfair dismissal.

This will not apply if there is any express provision which states that the new role will be for a trial period. If so, does the oral or written term specify what will happen in the event of the trial period being unsuccessful, for example, that the employee will revert back to the original position and terms and conditions? If no such provision exists then a return to the original role and terms and conditions can only be effected with the employee's agreement or consent.

Employers should therefore be extremely careful when considering the demotion of an employee or a variation of contract following disciplinary action. There needs to be express agreement on the part of the employee concerned and if the demotion is a disciplinary sanction, the organisation's disciplinary procedures and Acas code of practice on disciplinary and grievance procedures should have been followed in full. For more information see *British Broadcasting Corporation v Beckett [1983] IRLR 43* and *Hilton v Shiner Ltd (Builders Merchants) [2001] IRLR 727*.

- **Does an employer need to collectively consult employees if it intends to try and change their terms and conditions by dismissal and re-engagement?**

Yes. If an employer intends to bring employees' contracts to an end by dismissal and then re-engages those employees on new terms in order to effect change to the contractual terms, they will need to collectively consult with employees in accordance with sections 188 and 188A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) prior to dismissing them.

If an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult with all those who are appropriate representatives of the employees who may be affected.

- If there are between 20 and 100 proposed dismissals, consultation with representatives should take place at least 30 days before the first dismissal notices are issued.
- If there are 100 or more proposed dismissals, consultation must begin at least 90 days before the first dismissal notices are issued.

If the company recognises an independent trade union, the obligation to collectively consult will be with the trade union representatives. In the absence of a recognised independent trade union, the employees affected must elect suitable representatives for the purpose of collective consultation. Section 188A(1) of TULRCA details the requirements for the election of employee representatives.

If an employer fails to comply with their obligation to collectively consult, the employees may be able to claim a protective award of up to 90 days' pay for each employee concerned.

In addition the Information and Consultation of Employees Regulations 2004 (SI 2004/3426) in force from 6 April 2005 apply to organisations with 50 or more employees.

Employees therefore have the right to be informed and consulted about business matters which affect their employment. The employer must set up a regular system for information and consultation within the framework set out in the Regulations if at least ten per cent of the workforce requests it. The Employment Appeals Tribunal has the power to impose a maximum penalty of £75,000 on employers who do not comply with the Regulations.

The right extends to being informed and consulted on management decisions affecting their future, for example decisions relating to changes to terms and conditions and work organisation (including redundancies and job transfers).

- **How much notice should employers include in employment contracts?**

Employers must give employees with more than one month's continuous employment but less than two years one week's notice and thereafter one week for each completed year of service subject to a maximum of 12 weeks.

Length of continuous employment	Length of statutory minimum notice
Employees continuously employed for one month but less than two years	One week
Employees continuously employed for more than two years but less than 12 years	One week for each complete year employed
Employees continuously employed for more than 12 years	12 weeks (capped)

The minimum period of notice an employee with more than one month's continuous employment is required to give their employer is one week. There is no requirement that the notice periods are equal .

- **Can employers include mobility clauses in employment contracts to force employees to relocate?**

The short answer is yes, include the clause, but only attempt to enforce it if the clause can be objectively justified. Two main problems arise:

1. An employer has to exercise this mobility clauses in a manner that is consistent with the implied duty of mutual trust and confidence. This will mean consultation with the affected employees, the giving of adequate notice and considering any reasons why they may not be able to comply. Failure to do so could give rise to a claim for constructive unfair dismissal. For example *United Bank Ltd v Akhtar [1989] IRLR 507, EAT*. Mr Akhtar was a bank clerk based in Leeds. His contract contained an express mobility clause. He was given less than a week's notice to transfer to Birmingham. He refused on the basis he could not afford to move and his wife was ill. He resigned and claimed constructive dismissal. There was no breach of contract as the contract contained

an express mobility clause. However, the EAT felt the manner in which the employer had sought to exercise their contractual right had the effect of destroying the mutual trust and confidence.

2. Discrimination. The requirement for mobility of location is a requirement that a smaller proportion of women than men can generally comply with and it is possible this could give rise to a claim of indirect sex discrimination. A greater proportion of women than men were secondary wage-earners and therefore could not comply with the direction to relocate. (See *Meade-Hill and National Union of Civil and Public Servants v British Council [1995] IRLR 478, CA*.)

What is reasonable will depend on the facts of each case and whether an employer can objectively justify the clause.

- **Can employers include different terms and conditions in employment contracts based on length of service?**

Employers can include different terms and conditions in their contracts based on length of service provided the period of service is either:

- not more than than five years, or
- if more than five years, the employer has to be able to justify the provisions.

These provisions are contained in the Employment Equality (Age) Regulations 2006 which came into force on 1 October 2006. Their basic premise is that less favourable treatment of an employee based on age will be discriminatory and therefore unlawful; this will include certain benefits based on length of service. However, there are exceptions to enable employers to include different terms and conditions in contracts based on length of service.

It appears easier to establish justification of the provisions than was originally envisaged with the draft legislation. However some employers may decide it is easier to dispose of length of service benefits altogether or to award length of service benefits (for example, extra holiday or the granting of share options) to those who have accrued not more than five years length of service. But as long as employers can justify rewarding length of service for periods over five years there should be no difficulties.

To justify service related pay and benefits, the employer will have to be able to show that the benefit is needed to motivate staff, reward loyalty, and recognise experience.

To justify differences in benefits to workers with more than five years service, an employer will need to show that they are fulfilling a business need by, for example, providing information about recruitment and retention, or data on the relative efficiency of staff with different levels of service.

Length of service is the same for full-time or part-time workers, and the employer can take into account periods of absence, if it is reasonable to do so.

An employee who feels that the benefits structure is discriminatory will be able to make a complaint to an employment tribunal.

- **What is 'garden leave'?**

'Garden leave' is the term used to describe the situation where an employee is required by the employer to remain away from work (perhaps doing the gardening!) during the whole or part of the contractual notice period.

The employment relationship continues to exist during the garden leave period: the employer remains obliged to provide remuneration and contractual benefits and the employee is bound by the implied term of fidelity ie faithful and loyal service.

Garden leave clauses often contain wording within them, or are supported by separate contractual terms, which attempt to restrain an employee during the notice or garden leave period for one or all of the following:

- working for a competitor or setting up on their own account in competition
- contacting the employer's customer base with a view to soliciting custom and/or undermining existing contracts
- obtaining/using confidential information
- otherwise damaging the employer's business.

These clauses are known as 'restraint of trade' clauses or restrictive covenants; their presence may be of assistance in persuading a court to grant an injunction to uphold a garden leave clause .

- **An employment contract does not contain a garden leave clause. What are the implications of imposing garden leave in such circumstances?**

Unless there is a contractual term allowing an employer to place an employee on garden leave, the failure to make work available may constitute a repudiatory breach of contract by the employer. This is especially so where the employee loses more money by being on garden leave, for example:

- where pay is dependent upon being able to work eg piece work or commission only employment
- where a career is dependent on publicity
- where work is necessary for the maintenance of skills.

In such an event, the employee would be entitled to:

- accept the repudiation and treat the contract as at an end
- claim constructive unfair dismissal (if the employee has more than one year's service)
- claim to be no longer bound by any express restrictive covenants contained in the contract.

- **Can an employer make payment in lieu of notice if there is no express contractual provision allowing it to do so?**

It is preferable to include an express provision, as to pay in lieu in the absence of an express contractual provision technically constitutes a breach of contract and could result in a wrongful dismissal claim.

It is also inadvisable for an employer to risk breaching the contract in these circumstances, because the employee may then argue that because the employer has breached, it cannot rely upon its restrictive covenants.

- **How far can employers go with respect to the restrictive covenants in employment contracts?**

Any restrictive covenant will be void unless the employer can show that it is reasonable. Factors to take into account include:

- Does the employer have a legitimate interest to protect (such as trade secrets/confidential information/trained staff/clients)?
- Is the restriction wider than is necessary to protect that interest (in terms of time, geography and market).
- The more severe the clause, the shorter in time it should be.
- The clauses should be prospectively and retrospectively limited in time.
- Consideration of whether the geographical area of the clause is relevant to the operation of the business.
- If the clauses exclude the employee from earning a living.

For example, in the case of *Office Angels v Rainer-Thomas and O'Connor [1991] IRLR 214,* two employees with the Office Angels employment agency in the City of London were engaged in the business of supplying temporary workers and recruiting permanent staff.
The covenants in the employees' contracts of employment provided that for six months after the termination of their employment they could not:

- solicit custom from, or deal with, or supply the services of an employment agency to any person, or company which was a client of Office Angels at any time during their period of employment; or
- engage in or undertake the trade of an employment agency within a radius of 3000 metres of any branch of Office Angels at which they had worked for within the six months prior to the termination of their employment.

The employees left and set up Pertemps City Network working from an office within the 3000 metre radius, although they subsequently relocated outside that area. They were doing business both with former clients and with temporary workers with whom they had dealings with their previous employer.
The Court of Appeal found in favour of the employees - the covenants were too wide to be enforced and did not protect the employer because:

- the geographical restriction was unnecessary as business took place over the telephone and it made no difference where the office was
- a covenant simply restricting dealing with clients with whom the defendants had had contact during their employment would have been adequate rather than restricting dealings with **all** the employer's clients.

It is crucial to ensure that there are appropriate and well-drafted restrictive covenants in the contracts of employment and that immediate legal advice is obtained if an employee is threatening to compete during the notice period or period of the restrictive convenant.

A common problem that arises if restrictive covenants are not drafted carefully is that old contracts for previous employees may be adapted and used as a basis for new contracts for subsequent employees. The covenants become progressively widened each time the precedent is used to such an extent that the covenants become unenforceable.

Another illustration of the pitfalls of restrictive covenants which are too wide is *WRN Ltd v Ayris [2008] IRLR 889, QBD*. In this case the covenants were drafted in an attempt to prevent the former employee from having contact with customers who he had, and had not, dealt with. These covenants were therefore too wide to be enforceable and should have been restricted to the employer's customers who the employee personally dealt with

A legal test known as the 'blue pencil ' test may save some post-termination restrictive covenants which attempt to impose a wider restraint than was reasonably necessary for the protection of the employer's interests. Under the blue pencil test a court may be able to remove the offending part of a clause. If the

remainder of the clause makes independent sense then it is likely to be enforceable, the court cannot rewrite the clause. For an example see *Norbrook Laboratories (GB) Limited v (1) Adair (2) Pfizer Limited [2008] IRLR 878, HC.*

- **Can employers include a term to recover the cost of the training from an employee who leaves within two years?**

It is common for employers to include in contracts a term requiring repayment of the training fees if the employee leaves within a certain time. As such a term restricts the employee's freedom to work for others, there is an argument that it is in restraint of trade. If that argument is upheld, the term would be void unless the employer established that it protects a legitimate business interest, is reasonable, and is no wider than necessary to protect that legitimate business interest. If the term is void no money would be recoverable.

In view of the risk of facing such an argument, such terms should be on a sliding scale so that the amount of training fees repayable decreases the longer the employee stays in employment after the training.

Some contracts contain an obligation that binds the employee to a certain period of employment after the training, so that the employee is in breach of contract if he leaves before that period expires. The contract then provides for a payment if the employee breaches the contract by leaving early. In addition to the problem of restraint of trade, such a term may also be unenforceable as a penalty clause unless it is a genuine pre-estimate of the loss that the employer will suffer as a result of the employee's breach. In this case the employer may still be able to recover damages for breach of contract.

It is recommended that advice from a solicitor is taken on the drafting and enforceability of these terms.

- **Are there any future developments expected in the area of terms and conditions of employment?**

No major pieces of legislation affecting the area of terms and conditions of employment are expected in the near future. Some developments will arise from case law.

For example, cases resulting from The Employment Equality (Age) Regulations 2006 (SI 2006/1031) are starting to filter their way through the tribunal system providing guidance on the age related risks of certain terms and conditions. The basic premise is that less favourable treatment of an employee based on age will be discriminatory and therefore unlawful. There are exceptions in the Regulations to enable employers to include different terms and conditions in contracts based on length of service (see the question above on including different terms based on length of service).

See our Age discrimination and retirement FAQ for more information on the new age discrimination regulations.

o Go to Age discrimination and retirement FAQ

For details of developments since this update see our Recent developments section.

- Go to Recent developments

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