

EMPLOYMENT LAW UPDATE FOR CHARITIES SEMINAR

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Contracts and Handbooks

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A reminder of the statutory particulars and matters that we recommend you include in your contract of employment and staff handbook.

Introduction

It is rare that any contract needs to be put in writing to have legal effect. In the employment context, contracts automatically arise (and frequently do) whenever:

- payment is offered by one party to another;
- in exchange for work;
- the offer is accepted; and
- there is an intention to create a legally binding relationship.

As long as its terms may be construed from the behaviour of the parties, an employment contract does not even have to take the form of a verbal agreement; it will simply come into existence on the basis of the parties actions.

Doing work for someone, or paying someone to do some work for you doesn't always create an employment relationship between you. For example, at home you would not automatically become the employers of a window cleaner, or a plumber or electrician. In that sort of situation, the contract between the parties is much more likely to be a contract for services.

Unfortunately it is not always easy to discern whether a contract is for employment (also referred to as a contract of service) or a contract for services (which will involve the self employed or other contractors). Much will depend on what terms the parties actually agree to and how they structure their working relationship in practice.

While there are certain advantages to being self-employed and contracting out your services, employees have a much greater protection in law, including protection from unfair dismissal; a right to receive a statutory redundancy payment after two years in service; maternity and paternity rights; a right not to suffer harassment or victimisation on any of the prohibited grounds (age, sex, race, religious belief, etc); and a greater degree

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of protection under Health and Safety legislation. This creates a great incentive for workers to seek to establish an employment relationship, and for bosses to seek to avoid creating one, and consequently the issue is often in dispute.

Given the time and costs involved in repeatedly putting working relationships to the test, it would seem to make sense to formulate a simple straightforward test for employee status. But such a test has proved elusive. Over the years, the Courts have laid down a set of principals by which an employment relationship might be distinguished from a contract for services, but one only has to read a few of the cases to realise that working relationships are so complicated and so varied that a simple straightforward test is out of the question.

Because no single factor will effectively determine whether or not an employment relationship exists, the various tests are applied and considered collectively. Each focuses on a particular aspect of the employment relationship. One, for example, is the "Control Test", where the tribunal compares the relationship to the old relationship of 'master' and 'servant' with a view to determining whether one party has a sufficient degree of control over the other so as to create an employment relationship. Another determines whether there is sufficient 'mutuality of obligation' - in particular whether the employee must turn up personally to perform his duties (in contract to a right to send someone in their place) and whether the employer is obliged to provide work.

Generally speaking, an employment tribunal will construe a contract of employment from a working relationship in which:

- the work cannot be delegated;
- the party for whom the work is being done pays wages, holiday pay, sick pay, and provides other benefits, including in some cases a pension contribution, to the other party, and deducts PAYE and National Insurance Contributions (essentially if the 'employer' treats the individual as an employee then that will influence a Tribunal);
- the party for whom the work is being done provides and owns all the equipment.

None of these factors are determinative in isolation and a Tribunal will look at 'all the circumstances' in reaching a decision on the status of the relationship.

Statutory Definitions

The government has sought to clarify the distinction between an employee and an independent contractor (a "worker") by providing statutory definitions.

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In various legislation¹, an employee is defined as someone "...who has entered into and works under (or, where the employment has ceased, worked under) a contract of employment".

Meanwhile, two different definitions of a "worker" appear in employment legislation²:

1. Section 230(3) of the *Employment Rights Act 1996* defines a "worker" as "an individual who has entered into or works under (or, where the employment has ceased, worked under):
 - (a) a contract of employment; or
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
2. The definition at section 296 of TULRCA 1992 includes (in addition to the above) "an individual who works, normally works or seeks to work... in employment under or for the purposes of a government department (not including as a member of the" [armed forces]).

Written Statement of Employment Particulars

All employees (subject to being employed for at least 30 days) are entitled by s.1(1) of the Employment Rights Act 1996 ("the ERA") to receive a written statement setting out specified particulars of the employment relationship ("the Written Statement"). Employees whose employment began before 30 November 1993 are not entitled to receive a statement until and unless they request one, and they may make that request at any time during their employment or up to three months after its termination. Unlike a contract of employment, the Written Statement must be in writing.

Where an employer fails to provide any employee with a Written Statement, the Employment Tribunal has the power to make declarations as to the terms and conditions that apply to the employment. Generally speaking it is better for an employer to have the security of having set down these terms itself, rather than take the risk of leaving them to be inferred by a Tribunal. Although there is no free-standing penalty for failure to provide a Written Statement, where an employee succeeds in an unrelated employment claim, such as unfair dismissal, the Tribunal can, at its discretion, increase the amount of compensation by (or award compensation of) an amount equal to between two and four

¹ for example ERA 1996 s.230(1), TULRCA 1992, s.295, National Minimum Wage Act 1998 s.54(1), Maternity & Parental Leave etc Regs 1999 reg 2 and the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, SI 2002/3236, the Paternity and Adoption Leave Regulations 2002 SI 2002/2788 and Emp'tAct 2002 s.40

² One is in TULRCA 1992 s.296 and the other in Employment Rights Act 1996 s.230, the WT regs 1998, reg 2 and the National Minimum Wage Act 1998 s.54(3)

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weeks' pay (subject to the statutory limit on a week's pay). Calculate this sum across all of your staff and it will be far more cost effective for you to have written statements in place.

A Written Statement is not a contract. It does evidence the existence of the contract and details some of the terms and conditions of that contractual relationship, but it does not itself have contractual force. Where the parties have entered into a separate contract in addition to a Written Statement, the contract will always take precedence over the Written Statement where there is any disagreement between the two.

A Written Statement must, by law, cover the following points:

1. The name of the employer;
2. The name of the employee;
3. The date the employment commenced (and any period of continuous employment);
4. A brief job description;
5. The job location i.e. either the actual place of work, or, if the employee is required or allowed to work in more than one location, an indication of this and the employers' address;
6. Remuneration and the intervals at which it is to be paid i.e. weekly or monthly;
7. Hours of work. It goes beyond the strict requirements of the ERA, but it might be advisable here to mention the employer's policy in relation to overtime and overtime pay. It is usually appropriate to require senior employees to "devote their whole time and attention to their duties", whereas for less senior employees, it is common to require that "the employee can be compelled to work overtime where the needs of the business require it";
8. Holiday entitlement. This should include the number of days permitted; whether or not this includes or excludes statutory holidays; holiday pay rates as appropriate; and details of the dates of the holiday year. Where an employer fails to specify a date for the start of the annual leave year, the default position imposed by the Working Time legislation is that the holiday year runs from the employee's start date;
9. Entitlement to sick leave. This should include details of any contractual sick pay provisions. For example, an employer might state that employees are not entitled to contractual sick pay until they have completed three months continuous employment;
10. Pension and pension schemes. The strict requirement is for a statement whether or not a contracting out certificate exists in relation to this employment. The

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statement will also include details of whether the employer has a company pension scheme, from when an employee may be entitled to enter this or whether access to a stakeholder pension scheme is offered and whether or not an employer has a contracting out certificate. Contracts should always reserve the right to the employer to vary pension arrangements.

11. The entitlement of employer and employee to notice of termination. Minimum notice periods are set by statute. Where the statement is silent, then it is open to a Tribunal to infer a longer notice period commensurate with the role. Employers are not entitled to give a shorter notice period than they are entitled to receive.
12. Where the job is not permanent, the expected duration of the contract, or the date or circumstances when it is to end (where a contract is silent on this reasonable notice will be implied, subject to the statutory minimum);
13. Details of the existence of any relevant collective (i.e. trade union) agreements which directly affect the terms and conditions of the employee's employment - including, where the employer is not a party, the details of the persons by whom they were made;
14. Where an employee is normally employed in the UK but will be required to work abroad for the employer for a period of more than one month, the statement must also cover:
 - the period for which the employment abroad is to last;
 - the currency in which the employee will be paid;
 - any additional pay or benefits the employee will receive; and
 - any terms relating to the employees' return to the U.K.
15. The Written Statement must include a note giving certain details of the employer's disciplinary and grievance procedures, stating what rules and procedures apply to the employee, and specifying with whom (identifying the person either by description or by name) and how the employee should raise any concerns about disciplinary decisions relating to him or her; or any grievance relating to his or her employment. It should also detail any further steps which will follow from referring concerns or grievances; and finally

Where there is no information to give in relation to one of the required particulars (for example, where there is no pension entitlement, or there are no collective agreements in place), the particulars must say so.

There is no legal requirement for employees to sign their Written Statements, but asking them to do so will probably increase the likelihood that they will read them, which in turn reduces the risk of future disputes.

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In addition to prescribing which details of the employment contract must appear in the Written Statement, the Employment Rights Act 1996 determines how that information may be presented. Certain items must be contained in a single document. These are:

- the names of employer and employee;
- the date on which employment (and any period of continuous employment) began;
- remuneration;
- hours of work;
- holiday entitlement;
- job title/description; and
- place of work.

The details of employees' sick leave entitlement, pension arrangements and the employer's disciplinary and grievance procedures may be given by reference to some other document which is reasonably accessible to the employee, such as in a Staff Handbook (discussed in more detail below).

Additionally, the details of notice periods and any relevant collective agreements may be given by reference to legislation.

Contracts of Employment

As mentioned above, a contract arises automatically between employer and employee as soon as they embark on an employment relationship.

A contract of employment is usually taken to exist completely independently of the written statement of particulars. It may cover far more than is required under the Statement of Written Particulars. Many employers find it convenient to combine the two, incorporating all the information required to appear in the Written Statement into the body of a letter of engagement which sets out the terms of employment, or into a more formal written contract. Employers who choose to do this must remember that they must still comply with the statutory timescale for providing the information required by s.1(1) ERA. The Written Statement must be provided to any employee within two months from the date when the employee's employment begins.

Employment contracts usually contain a mixture of "express" and "implied" terms. Other terms may be "incorporated" into the contract or "imposed" by law.

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Express Terms

These are terms which are explicitly agreed by the parties. They may be either oral or written. Where any ambiguity arises, a court or tribunal may take into account any relevant surrounding circumstances. It is well-established in law that express terms take precedence over implied terms.

Implied Terms

A term can only be implied if a court or tribunal can reasonably presume that it would have been the intention of the parties to include it in the contract. Usually the terms the parties intended are evident from the parties' conduct, from the way the contract has been performed, or from the fact that without such terms, the contract would be unworkable (for example where the person is employed as a driver, that he has a current driving licence). Very occasionally, terms are implied into a contract by virtue of the fact that it is normal custom and practice to include such a term in contracts of that particular kind.

Some terms are considered to be central to any employer-employee relationship, and will always be implied, unless they are express. The courts regard them as being a necessary part of any contract of employment and breaches of them will provide the basis for claims of breach of contract.

Employers are under an obligation to:

1. pay agreed wages and provide work;
2. indemnify employees for anything that they do (or fail to do) in the course of their employment;
3. provide reasonable support, for example by having a personnel department, having a clear informal grievance procedure; informing employees about external sources of information, such as about their pension rights or stress related problems;
4. take reasonable care of employees by providing a safe system of work and a safe work place;
5. provide a suitable working environment with regard to health and safety issues as well as a general ethos for the organisation. An employer can be held vicariously responsible for the actions of its staff, which is commonly an issue around harassment and bullying;
6. provide a grievance procedure;
7. take reasonable care when giving references (although there is generally no obligation to give a reference); and

8. inform employees of contractual rights.

Meanwhile, employees are under an obligation to:

1. render faithful service;
2. obey lawful and reasonable orders;
3. exercise reasonable care and skill;
4. give personal service;
5. not make secret profits;
6. not undertake work for a competitor, if the employee possesses confidential information;
7. avoid conflicts of interest and duty;
8. not disclose any trade secrets or confidential information (*Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617)

Underlying all of this on both sides of the employment relationship is what is referred to as “the mutual term of trust and confidence”, which both parties must respect and observe.

Even where terms are obviously implied, it is still often better to make them express, and better still, written down, because it helps to fix them in the minds of the parties. For example, the Copyright Designs and Patents Act 1988 states that all intellectual property rights in work created in the course of employment belongs to the employer. But employees may not know this, or may not consider it at the pertinent time, and so it is generally better to state expressly that intellectual property rights belong to the employer, so that both parties are clear from the outset. Generally speaking, written contracts add clarity and reduce disputes.

Incorporated Terms

Some terms and conditions are incorporated into the employment contract (and thereby given contractual force) from other sources, most commonly, work rules, policy documents, Staff Handbooks and collective agreements with trade unions. Where they are incorporated into the contract, they are legally enforceable by either party and cannot be varied, except in accordance with normal contractual principles.

As this paper discusses in more detail below, Staff Handbooks and policy documents are not automatically taken to be incorporated into employees' contracts of employment and mere mention of such documents within the contract will not amount to incorporating them. Whether a provision from another source is incorporated into a contract (and therefore has contractual force) is a matter of law.

Imposed Terms

Some terms are imposed (and may be varied) by statute (for example the right not to be discriminated against on the grounds of sex, race, disability, sexual orientation, religion or belief; maternity pay etc.)

When does a contract arise?

A contract is formed when one of the parties accepts an offer put to him by the other. It need not be the employer who makes the offer and the employee who accepts, though this is often the case in practice. Where an employer makes an offer to a prospective employee (for example to pay an annual salary of £20,000) and the prospective employee responds with a counter-offer (for example by saying he will accept £30,000), an employment contract will only arise when (and if) the employer accepts the counter-offer. Once a counter-offer has been made in clear and certain terms, it supersedes the original offer. A person whose counter-offer is rebuffed cannot then take up the original offer.

Considerations for employers when drawing up contracts of employment

Employers should:

1. Consider in what capacity they are contracting.

A trust or unincorporated organisation cannot technically contract in its own name, as it is not a legal entity. The contract would be taken to have been entered into by the individual trustees who signed it. This is not ideal for those trustees, who would be personally liable for any employment claims. Where a trust or unincorporated association is to have employees, the trustees or committee members should therefore consider incorporating the organisation as a company limited by guarantee to help to protect its trustees from personal liability.

2. Be clear about whether the individual is to be employed or self-employed.

As discussed above, there are various factors which a Court could use to decide this. Employers should remember that, an individual whose contract stipulates that she is a worker is likely to think she is a worker, which is helpful, but not the whole story. Employment status does not depend upon agreement, and the fact that a worker is described (either by herself or her employer) as self-employed does not necessarily mean that she is. The Courts look at how the relationship works in practice. And even if an individual is self-employed, she might still be a “worker”, with various rights under employment legislation (such as under discrimination law).

3. Consider carefully what needs to go into the contract, and what should go into any non-contractual support documents, such as a Staff Handbook which has not been incorporated into the contract. Incidentally, care should be taken not to inadvertently incorporate the provisions of a Staff Handbook into the contract by

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careless drafting. Provisions which are intended as guidance, such as recommended timescales, can easily become binding.

Additional Terms, Conditions, Policies and Requirements

Some common examples of additional provisions employers introduce are:

1. A mandatory probationary period. Provision should also be made for termination during the probationary period, i.e. payment in lieu of notice etc;
2. The right to make deductions from wages where necessary (such as where an overpayment has been made);
3. Information about reporting/chain of command. This in terms of both day to day work and also factored into the disciplinary and grievance procedure;
4. Detailed job description. This could be a separate document referred to within the Handbook or contract;
5. Expenses policy. It should be clear for what and on what basis expenses are to be paid, for example if it is necessary to provide receipts;
6. Sickness absence policy, including the employer's right to request that an employee undergo independent medical examination;
7. Private medical expenses;
8. Confidentiality, including post termination provisions. Even though confidentiality is implied into the contract, it is usually more effective to expressly state that employees are under an obligation of confidentiality;
9. Data protection. An employee should confirm that their employer can deal with their personal information in relation to their employment and an employer should confirm that it will comply with the provisions of the Data Protection Act 1998; and
10. A garden leave clause. Such a clause, which must be express, allows employers to pay employees' full remuneration under the contract of employment, but require them to stay at home, rather than attend work, where they could potentially cause disruption, discover information that could advantage their next employer, or poach customers and fellow employees.
11. Suspension. Similar to garden leave but used as part of the disciplinary or grievance procedure. An employee may only be suspended where there is either a contractual or statutory (e.g. on medical grounds during pregnancy) right.

Varying a Contract

A contract of employment is a legally binding agreement. This means that mutual consent of the parties is needed for any change – unless there is a provision within the agreement allowing for variation (within set parameters and in accordance with a fixed procedure). Terms and conditions may also be varied as a consequence of changing collective agreements. Such changes become binding on employees.

Where employees refuse to agree to contractual changes, employers may find the only way to push them through is to terminate employees' existing contracts and substitute new ones. Employees are technically dismissed and re-engaged, and this is subject to the usual statutory procedures and requirements; in particular the dismissal must be for a fair reason, likely to be either redundancy or "some other substantial reason". More information on this may be found in our handout on Redundancy and Restructuring.

Employees who qualify for a Written Statement are also entitled to written notice whenever a change occurs in one of the particulars required to be covered in the Written Statement. Circulating a photocopied notice is perfectly adequate, provided that a copy is given to each affected employee individually. This notice must be given at the earliest opportunity, and in any event within one month of the change. In most cases it should contain explicit particulars of the change. However, particulars of changes in the following:

- entitlement to sick leave, including entitlement to sick pay;
- pensions and pension schemes;
- disciplinary rules and disciplinary or dismissal procedures; and
- any further steps which follow from the making of an application under the employer's disciplinary, dismissal or grievance procedures

may be notified to employees by reference to another document (which may itself be contractual or not) which is reasonably available and accessible to them. In addition, changes in the notice of termination requirements may be given by reference to the provisions of the relevant legislation or to those of any relevant collective agreement to which the employee has reasonable access.

The itemised pay statement received by most employees may be used to notify employees of changes to their pay, provided that their attention is somehow drawn to the change.

Staff Handbooks

In addition to the terms and conditions contained in the Written Statement and the contract of employment, many employers (particularly larger organisations, where ensuring consistent treatment of employees across several sites may depend on it) will

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have written policies and procedures which set out in more detail how various situations should be handled.

It should be clear whether the Staff Handbook, or sections of it, are intended to be contractual, i.e. which parts the employer intends to be incorporated into the contract of employment. This is often evidenced in the preamble to the handbook itself, either by a statement that the whole handbook is intended to be incorporated into the contract, or by reference to individual policies or sections. Just as often, the contractual nature of the Staff Handbook (or parts of it) is evidenced by a statement within the contract of employment.

The underlying reason for having non-contractual policies and procedures is to minimise the risk of employees claiming breach of contract whenever the detail of a policy or procedure is not strictly adhered to. It also gives employers much more freedom to change their policies and procedures, without having to undertake consultation. This flexibility is particularly important where the policies and procedures which make up the Staff Handbook are based on statute, e.g. maternity entitlement, where changes will be required to ensure the Handbook remains up to date.

Employers should not assume that a court or tribunal will only look at the wording of a provision or policy when deciding whether it is contractual or not. In the event of a dispute, it will become important to consider what the provision is really about. Recent case law suggests that provisions which refer to 'entitlements' are likely to be contractual.

Typically a Staff Handbook will contain:

- background information on the company. This need only be short but might provide new employees with useful information about the ethics of their new workplace, its mission, vision and values;
- conduct at work, behaviour and appearance, timekeeping, flexibility and overtime;
- personal matters; i.e. whether staff can use emails and phone calls for personal use and if so, how this may be limited;
- protecting the organisation – confidentiality, security measures, company property, restrictive covenants.

The handbook is also the place for the company policies on:

- recruitment and career progression;
- performance and appraisals;
- redundancy;

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- equality and diversity;
- harassment;
- family friendly policies, such as flexible working applications, maternity, paternity, parental leave, time-off for dependants and adoption;
- Health & Safety including smoking, alcohol and drugs, stress management and relevant training and development;
- whistle blowing;
- Disciplinary and Grievance procedures. Employers must remember that if these are stated to be contractual, any breach of procedure can also result in a breach of contract claim;
- absences – short term and long term, various reasons
- Other – jury service, armed forces service, public duties, training/study leave, employee relationships, disaster recovery planning
- Variation i.e. how terms in a contract may be varied.

Conclusion

This document is intended as a brief overview of the Statement of Written Particulars, Contracts of Employment and Staff Handbook.

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