



Contracts of Employment

Unite guide for members



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■ INTRODUCTION

This guide provides the background to, and looks at some of the issues involved with, contracts of employment.

It is not an exhaustive document and you should contact your shop steward or full-time officer for detailed queries on this issue.

The guide has been drawn up by the Union's research department with the help of the Union's solicitors to give guidance to shop stewards and members and was last updated in November 2008.

■ THE CONTRACT OF EMPLOYMENT

A contract of employment exists as soon as an employee accepts an employer's offer of employment. The terms of the contract can be written or oral or a combination of both.

There is no legal requirement for a contract of employment to be written but every employer is legally required to give each employee a written statement of particulars giving the main terms and conditions of their employment no later than 2 calendar months after the employee has commenced work. The employee is also entitled to have this statement kept up-to-date when any changes are made. The written statement of particulars is evidence of the terms and conditions of a contract of employment but it does not constitute a contract.

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 will not 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, unless the wording of the contract is unclear. However, if the employee has only been given a written statement of particulars then the accuracy of the statement is open to challenge.

Contractual terms may apply only to certain individuals or they may be 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 in such cases 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 or personal contract, because it is not subject to any collective agreement.

A contract of employment is a legally binding agreement between the employer and the employee but it can be a complicated and somewhat haphazard arrangement.

■ THE WRITTEN STATEMENT OF PARTICULARS OR STATUTORY STATEMENT OF TERMS

Employers have a statutory obligation to provide written details of an employee's main contractual terms. The rules are set out in Sections 1 to 12 of the Employment Rights Act 1996 (ERA). The written statement of particulars must give the name of the employer and the employee, the date on which the employee commenced employment, and the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which would count as part of that employee's continuous period of employment). It must also give the following information:

- the title of the job which the individual is employed to do (or a brief job description);
- salary (or the method of calculation) and the frequency of payments;
- hours of work;
- holiday pay and entitlement;
- sickness pay and sick pay arrangements;
- pension arrangements;
- notice period;
- where the employment is not intended to be permanent, the written particulars should state how long the employment is expected to last. Similarly, if the employee is employed under a fixed term contract, the date on which the contract is due to end should be stated;
- disciplinary and grievance procedures;
- whether a contracting out certificate is in force; such a certificate is issued where there is an occupational pension scheme which satisfies certain conditions;

- the place of work or an indication that the employee is required to work at various places and the address of the employer;
- any collective agreements which directly affect the terms and conditions of employment;
- if the employee is required to work outside the United Kingdom for a period of more than one month then the period for which they are to work outside the United Kingdom, the currency in which they are to be paid, any additional pay or benefits due to them by reason of them being required to work outside the United Kingdom, and any terms and conditions relating to their return to the United Kingdom.

Notes:

- a) A job title and description can be important when deciding whether a contract has been breached. It should state accurately what the employee is, or might be, required to do.*
- b) Full details of each item are not required, but an employer must advise the employee where additional information can be found.*
- c) Where there are no provisions relating to any one of the matters listed above, that fact must be stated e.g. where no contractual sick pay is provided by an employer.*

Exclusions

Employers are obliged to give employees written statements in all cases except the following:

- where a person's employment continues for less than one month;
- mariners and seamen;

Alternative to a written statement of particulars

A written statement of particulars can take the form of a written contract of employment or letter of engagement which contains all the terms and conditions legally required.

Legal status of the statement

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 which they have. Its status is not however that of a contract, but the terms will be constructed as strong evidence of the terms of the contract. There have been cases where terms contained in a written statement have been found not to be terms of the contract. If the employee only has a written statement of terms and no contract of employment it will, however, be difficult for the employer to argue that the written statement is not accurate.

Employers often ask employees to sign a copy of the statement to state they have received it. An employee who receives a written statement of terms which he considers to be inaccurate should point out the inaccuracies, otherwise he may be taken to have given up any rights to dispute the terms by having been given a copy of the statement and by continuing to remain in employment without questioning them.

■ REMEDIES

In order to enforce their right to be given a written statement, an employee can refer the matter to an employment tribunal to determine what particulars ought to have been included or referred to in a statement. The employee may also refer the matter to an employment tribunal where they have received a statement but it does not contain all the above particulars. Under Section 11(2) of ERA the employer may also refer the matter if the employee is questioning the statement and the employer believes that the terms have been satisfied. Section 11(2) of the Act allows either party to refer the matter to the employment tribunal if the statement of change has been incorrectly drawn up.

In the case of *Eagland v BT* (1992) IRLR 323CA the Court summed up the powers of the tribunal in referrals under Section 11.

- tribunals should make findings as to what the terms and conditions of the contract of employment initially made were and then consider whether they have been varied;
- if there is no statement or certain items are missing, the tribunal must consider the evidence as to what terms have been agreed and if there is no agreement then a statement to that effect should be made;
- tribunals cannot comment on the fairness or unfairness of the terms of the contract;
- tribunals can infer or imply terms from the circumstances.

An employee cannot bring a free-standing claim for damages for failure to provide a written statement of

terms. However, when proceedings before an employment tribunal in relation to other matters are being brought and the tribunal finds in favour of the employee and at the time those proceedings were begun the employer was in breach of Section 1(1) or 4(1) of ERA then the tribunal can make an award of compensation of up to 2 weeks' pay and may increase this up to 4 week's pay. The other types of proceedings the existence of which allow the tribunal to make this award are claims for equal pay, sex discrimination, race discrimination, disability discrimination, unauthorised deductions from wages, detriment in employment, unfair dismissal, claims for redundancy payment, claims in relation to the national minimum wage and claims in respect of breach of the Working Time Regulations.

Once the accurate terms have been established, for example that the rate of pay should be higher, an action can be brought to claim any losses which arise by reason of failure to honour the correct terms.

■ NEGOTIATING AN INDIVIDUAL OR PERSONAL CONTRACT

It is rare outside of top managerial positions for there to be any genuine individual negotiation on terms of contract. Where a contract is offered which is not based on terms negotiated with the Union it is important to ensure that all terms and conditions are covered and that it is clearly stated how changes to those terms can be effected. In such cases advice can be sought from your Unite full-time officer before entering into any binding agreement.

Employees should ensure that everything relating to their 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 their understanding of the terms agreed and ask that the employer signs a copy of the letter and returns it, the employee should retain a copy of this letter for future reference. An agreement signed by both parties will carry significant weight if the contract is challenged.

The following items should be specifically or expressly (see below) covered in an individual contract:

- job title;
- pay increases, grading and performance. There is potential for discrimination in individual contracts especially with pay systems based on evaluation methods which are not clearly understood. It is advisable to ascertain how and when pay increases will be determined, whether they will depend upon individual or group performance and whether they will be guaranteed to match increases in the cost of living;
- hours of work, overtime pay/time off in lieu;
- payment of expenses;
- promotion structure;
- annual leave entitlement;

- training and professional development;
- retirement, ill health and pension arrangements;
- redundancy provisions, including job security and redeployment;
- health and sickness arrangements;
- facility time and other time off;
- provisions for maternity/paternity and compassionate leave;
- company car entitlement, if relevant;
- health and safety cover;
- notice requirements;
- discipline and grievance procedures.

Terms usually found in collective agreements which 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. It is important to cover all eventualities because it is more difficult to add or alter terms once the contract has been accepted.

Notes:

a) if there is nothing in writing, oral statements can be taken to define the terms agreed so keep a record of such statements, when they were made and the name of anybody present when the statements were made.

b) if a term is uncertain, discussions or conversations can provide evidence as to its intended meaning.

c) an oral promise or agreement can be held to have modified the written terms.

d) a contractual document, such as a letter of appointment, will generally take precedence over a written statement of particulars. If there is a contradiction between the two, the contractual document is preferred.

NB. It is very important for workplace representatives to keep notes made at or near the time recording all agreements that are reached, in minute books for example, and also to keep copies of all agreements and correspondence relating to agreements even if they are later changed.

■ THE SCOPE OF THE CONTRACT

An individual written contract may not contain all the elements governing an employment relationship and in order to establish the exact terms covered it may be necessary to look at:

- a letter of appointment;
- any documents referred to in a letter of appointment or written statement of particulars, e.g. those relating to a pension scheme;
- the works rules/staff handbook;
- health care scheme;
- custom and practice in the work area;
- custom and practice in the industry;
- any collective bargaining agreement that may affect the contract;
- correspondence between an employer and employee during recruitment, as this can become part of the contract;
- any correspondence or statement which amends the terms and conditions;
- any records of correspondence.

■ CLARITY OF THE TERMINOLOGY

It is essential that an individual contract is written in a language that clearly conveys the meaning intended by the employer and employee when drawing up the contract. If a term is not clear – it should be clarified. It is most important that the employee understands the meaning of their contract and agrees with the contents before signing it. If the employee is not sure of exactly what a term means they should seek advice from their full-time officer before accepting the contract.

■ TERMS OF THE CONTRACT

Express Terms

Express terms are those terms of the contract which the employer and employee expressly discuss and agree upon orally or in writing.

Because it could take too long to negotiate all the terms and conditions of a contract an employer and employee can agree to expressly incorporate certain matters from relevant documents, such as a collective agreement, staff handbook, etc. Where such documents are intended to form part of the contractual terms they should be referred to in the contract and preferably be included as appendices to it. In any event employees should make sure they get a copy of such documents and read them carefully before signing a contract.

Implied Terms

There may be many obvious rights and obligations on either side which are not specifically discussed and agreed and which are implied or presumed to be included in the contract.

Implied terms include:

1. the employee's duty to serve the employer faithfully with due diligence and care and not to act against their interests.
2. The employer's duty to behave in accordance with good industrial relations practice; not to destroy the relationship of trust and confidence between employer and employee; to provide a safe working environment.

Statutory terms

These are imposed by law and include the following rights:

- to equal pay;
- to an itemised pay statement;
- to maternity benefits;
- to minimum periods of notice of termination of employment;
- to a safe system of work.

Terms can also be implied by custom and practice. This occurs if such terms are regularly applied in a particular trade or industry or in a particular area. It is assumed that both parties were aware of such a custom and agreed to it being included in the contract without there being any need to put this into writing. A court will only imply terms by custom and practice if they are well known, clear and fair and have been consistently applied for a period of time.

If the terms of contract are unlawful or contrary to public policy, then the contract will be unenforceable in a court of law.

■ CLAUSES WHICH COULD BE CHALLENGED

Confidentiality

A confidentiality clause may require an employee to agree not to divulge confidential or sensitive information. Under common law such a restriction can only be enforced where the information is genuinely confidential.

Non-Competition

A non-competition clause may prohibit an employee from working in competition with the employer after leaving employment.

Under common law, such a clause may be regarded as void because it restrains an individual's right to trade their labour and the courts will only permit a non-competition clause to operate if the scope of the restriction is drafted as narrowly as is possible to protect a legitimate interest of the employer and is reasonable in all the circumstances.

Non-Solicitation

Another form of restriction attempts to prevent what is called solicitation of the previous employer's customers. This means trying to get your old employer's customers to give you their work after you have left employment.

The court will expect such restrictions to be limited. The rule normally upheld by the courts is a limitation restricted to customers with whom the employee had direct business contact but only if it is expressed to apply for a limited period of time. Each case will be reviewed by the courts on its merits but in general, the wider the scope of the clause the greater the likelihood that it will be declared unenforceable.

Mobility

A mobility clause requires an employee to be mobile and to take up employment wherever it is offered. However, for this clause to be effective it should specify relocation within a specified geographic area and provide for notice to be given prior to a move.

Employers should not apply mobility clauses in an unreasonable manner.

Inventions

Where an employer wishes to include a clause covering inventions, the clause should be based on the requirements of Section 39 of the Patents Act 1977 which states that an invention made by an employee only belongs to the employer if it was made at work in the course of the employee's normal duties.

It is recommended that the full text of the relevant section of the Patents Act 1977 is included within the contract.

Right to vary

The contract is a form of agreement between two parties and therefore if the terms of the contract are to be changed, the parties need to agree upon the change. A contract of employment, as with any other contract, can only be varied with both parties' consent.

The problem of contractual variation is one that has come up more and more frequently over recent years due to employers' desire to make cuts in their costs. Employers have been looking to change working practices, for example hours of work, and in some cases have attempted to cut rates of pay.

There is no right for either the employer or the employee to vary the contract of employment without the agreement of the other party. Employees who believe their employers are trying to do this should seek their full-time officer's advice immediately. Employers may seek to impose changes to the contract by terminating it and offering the new terms. Employers trying to impose new terms upon employees which are less beneficial may be able to defeat claims for unfair dismissal if the contract is terminated so long as they consult about the need to make such changes, give proper notice and provided that a business necessity for the alteration of the term can be proved.

Unilateral variation

Unilateral variation by either party, but more commonly in recent times by the employer, if it is not accepted by the other party and is sufficiently serious, will be a repudiation of the contract. This is a breach of contract going to its root. A repudiatory breach entitles the employee to resign and claim constructive dismissal which may lead to a finding of unfair dismissal by an employment tribunal.

In many cases employees will carry on working largely due to the fact that there are no alternative jobs for them to go to.

This does not mean, however, that they are happy with the situation. Unfortunately it is possible to imply acceptance of a change in terms if the employee makes no objection. An employee should therefore protest, notwithstanding that the employment is continuing after the change and in these circumstances a court or tribunal should not rule that the variation has been accepted by the employee. It is important to remember that objections should be formal, prompt and written where possible.

Repudiatory breach

If the employer has fundamentally breached the contract of employment (i.e. a very serious breach that goes to the root of the contract and/or destroys the relationship of trust and confidence) an employee can resign in response to the breach and pursue a claim of constructive dismissal at an Employment Tribunal. In order to successfully claim constructive dismissal a number of conditions must be met:

- There must have been a very serious (i.e. a repudiatory) breach of the contract by the employer;
- the employee must resign directly in response to that breach; and
- The employee must resign immediately, or very soon after, the breach or they will be deemed to have waived the breach.

It is a high risk strategy for an employee to resign their employment and claim constructive dismissal. In all cases where problems at work are so serious that the employee feels they have no alternative than to resign, immediate advice should be sought from a Unite full-time officer.

■ CHANGES TO A CONTRACT OR WRITTEN STATEMENT OF PARTICULARS

Ideally any change should be discussed in advance between the employer and the relevant trade union(s) and agreed either orally, or preferably, in writing. No alterations may be made to an employee's contractual terms without their consent. Such consent must be:

- by an employee agreeing to the change orally or in writing (express agreement);
- through collective bargaining agreements;
- by an employee continuing to work without protest for a significant period of time whilst being aware of the change (implied agreement);
- through a term in the contract which provides for a variation, for example a mobility clause.

Any change in an employee's contractual terms, of which written particulars must be given, must be communicated to the employee in writing not more than one month after the change.

Where no agreement has been reached the individual employee should notify their full-time officer of the nature of the changes proposed. Where any change is seen as detrimental to the current contract then the individual should draw attention to the fact that they object to the change.

An employer may consider that a change to the contractual terms is essential for the operation of the business.

If the employer fails to gain an employee's agreement to that change then to avoid a breach of contract, the employer must give the employee proper statutory or contractual notice to terminate the contract and offer a new contract on the revised terms. The termination would still be a dismissal under the law and open to a claim for unfair dismissal in which the employee could ask to be reinstated onto the terms of the old contract – it should be noted these cases are very difficult to win.

Where an employer has changed an employee's contract the two main courses of action available to the individual are:

- To resign and claim constructive dismissal on the grounds that the changes are such as to destroy the relationship of trust between the employer and employee i.e. go to the heart of the contract.
- To register clearly their objection to any specific change(s), in order to demonstrate that they have not accepted such specific change(s).

Before deciding upon any action the individual should immediately seek the advice of their Unite officer.

■ TRANSFER OF UNDERTAKINGS REGULATIONS

BACKGROUND

The Transfer of Undertakings (Protection of Employment) Regulations 2006 – TUPE, were originally designed to implement into British law the terms of the Acquired Rights Directive formulated by the European Commission.

The Directive and consequently the TUPE Regulations were designed to protect the rights of employees, when the businesses they worked in were transferred to another employer

These rights include:

- the automatic transfer of employment to the new employer with their terms and conditions intact;
- the honouring of existing collective agreements
- continued recognition of trade unions;
- dismissal of any employee (before or after the transfer) for any reason connected with the transfer, classed as automatically unfair.

As TUPE has become increasingly relevant to British workers, a number of clarifications and developments have started to emerge. Indeed the law involving TUPE is very fast changing so members would be well advised to contact their Unite full-time officer if they face problems in this area.

CHANGES TO THE CONTRACT

As discussed above, TUPE operates to transfer employees with their terms and conditions of employment intact from the transferor to the transferee employer. But what happens if either the transferor or transferee try to change those terms and conditions? The House of Lords has considered this issue in the case of *Wilson v St Helens Borough Council* (1998) 706HL(IRLR). The House of Lords indicated that if the reason for the change in terms was the transfer itself then any agreement to vary terms would be invalid. However, if there were other reasons for the change then the agreement to vary terms might be effective. The Lords acknowledged that an attempt to vary terms could still be due to the transfer even if it took place some time afterwards, but were not sure as to what length of time had to pass before the link with the transfer could be regarded as broken. In practice it appears that the longer the time that has elapsed since the transfer, then the easier it will be for the employer to find a reason for the change which is not simply the fact of the transfer itself.

A more detailed guide to the TUPE Regulations 2006 is available from Unite as a separate publication.





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