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Employment contracts and the law

1 . What an employment contract is

A contract between an employer and an employee is a legally binding agreement. This could be a 'contract of employment' or a 'contract of service'.

An employment contract can be agreed:

- verbally – this is when it's agreed through conversations
- in writing – for example, a job offer letter or through emails

Parts of an employment contract can also be agreed through conduct. This is when people's actions show there's an agreement, even though they have not written it down or spoken about it.

The difference between an employment contract and a written statement

By law (Employment Rights Act 1996), anyone legally classed as an employee or worker has the right to a 'written statement of employment particulars'.

A written statement includes the main terms of someone's employment, for example pay and working hours.

This document is often referred to as the 'employment contract'. But by law, the employment contract is broader than just the written statement.

For example, an employment contract might also include:

- other clauses – for example about keeping sensitive company information confidential
- the organisation's code of conduct
- policies – for example on social media or GDPR

Those legally classed as workers do not have the right to a written statement if they started the job before 6 April 2020.

Find out more about the written statement

When the employment contract begins

An employment contract begins when the employee starts work.

This is the case even if the employer has:

- failed to give the employee their written statement
- not put any other parts of the employment contract in writing

The contract might be formed earlier if all the following apply:

- the employer set out the terms of the job in a clear and definite way, verbally or in writing
- the job offer was unconditional or the person met all the conditions – for example, the employer was satisfied with their references
- someone accepted the job offer verbally or in writing

2. Types of terms in a contract

An employment contract usually includes:

- 'express terms' – specific terms that are usually put in writing, for example the employee's pay or working hours
- 'implied terms' – for example, things that are so obvious they do not need to be written and terms that come from employment law
- 'incorporated terms' – these form part of the contract even though they come from other sources, for example a staff handbook or an agreement affecting many employees

Express terms can be agreed verbally, through conversations. Terms agreed verbally are as legally binding as terms that are written down.

However, it's important to remember:

- employers are required to put in writing any terms which form part of the written statement of employment particulars
- it's helpful to put all terms in writing – this will mean everyone understands their rights and responsibilities

For example, it might seem obvious that a school caretaker needs to live near the school. However, the employer should put in writing in the contract where the caretaker must live. This would avoid misunderstandings.

Information in the contract must follow the law. For example, an employer cannot include a term stating that an employee is paid £4 per hour. This is because this amount is below the National Minimum Wage.

If an employer does include a term that's against the law, they cannot enforce it.

Implied terms

Implied terms include terms that are:

- too obvious to be written – for example, not stealing from your employer
- 'statutory' – this means that they come from employment law
- implied through 'custom and practice'

Terms can also be implied if they are:

- necessary for 'business efficacy' – this means they're needed to make the working relationship possible
- conduct terms – this is when people's behaviour suggests they've agreed something, even though they have not written it down or spoken about it

Terms too obvious to be written

Terms of a contract can be implied when they're so obvious that they do not have to be written.

An employment tribunal judge would consider a term too obvious to be written if it passes the 'officious bystander test'. This is when it's so obvious that the employer and employee intended to include a term, they did not feel they needed to make it an express term.

Even if they're unwritten, these terms are often crucial for an effective working relationship between an employer and employee.

To prevent misunderstandings, the employer should make clear:

- the standards of behaviour expected from employees – for example, anyone who deals with customers should be polite
- what happens if these are not met – for example, the employer will investigate reports of theft and pass them to the police if necessary

The employer should also make clear the standards of behaviour their employees can expect of them. For example, what support they'll put in place to meet their duty of care. This could include an employee assistance programme (EAP) or mental health first aiders.

They should put these in writing, for example in an employee handbook.

Statutory terms

'Statutory terms' are terms that come from employment law. The employer does not always need to put these types of terms in writing.

For example, employees would be entitled to statutory redundancy pay if they meet the criteria. Their employer does not need to put the statutory pay rate in writing.

The exception is any information that must be in the 'written statement of employment particulars'. For example, if the employer pays an employee the minimum wage, they must include that amount in the written statement. Find out more about what the written statement must include.

An employer cannot override statutory terms with an express term.

Custom and practice

'Custom and practice' terms are often left unwritten. This type of term could become part of the employment contract when it's:

- 'notorious' – this means the term is generally well-known in the business or industry, usually over a long period of time
- reasonable
- certain

To prevent misunderstandings, employers should discuss with employees and any representatives whether any terms have become implied through custom and practice. They should put the details in writing, if employment contract changes are agreed.

Example of a term which might be considered implied through custom and practice

An employee might expect a bonus of £100 at the end of the year if their employer has paid that annually for the last 10 years, to everyone in their team.

To prevent misunderstandings, the employer could state in the contract that getting an end of year bonus:

- depends on the business's profits in the latest financial year
- is paid at the employer's discretion

Contact the Acas helpline

If you have any questions about implied terms, you can contact the Acas helpline.

Terms restricting an employee's actions

An employer might include a 'restrictive covenant' in an employee's contract. This is a term stating that an employee cannot take certain actions that are in competition with the employer's business. This could apply during their employment or once it ends.

For example, a term might say that after the employee has left the organisation, they are not allowed to approach the employer's customers for business.

'Non-compete clauses' are a type of restrictive covenant.

An employer will not usually be able to enforce restrictive covenants unless they're clear, specific and time-restricted. Even then, this area of the law can be complex.

If you have questions you can contact the Acas helpline.

If you're an employer, you should consider getting legal advice before including restrictive covenants in contracts.

Exclusivity clauses

An employer might include 'exclusivity clauses' to stop employees from working for another employer while they're still employed with them.

Find out more about exclusivity clauses

Employer and employee duties

Employers and employees have certain duties that automatically form part of the employment contract. They cannot be overridden by any express term.

Find out more about employer and employee duties

3. Exclusivity clauses

Sometimes employers include 'exclusivity clauses' in their employees' contracts. These clauses are to stop the employee from either:

- working for another employer
- working for another employer without consent

If someone's on a zero-hours contract

By law (Employment Rights Act 1996), if someone is on a zero-hours contract, their employer must not:

- try to stop them working for another employer by putting an exclusivity clause in their contract
- treat them less favourably if they also work for another employer
- dismiss them for working for more than one employer – but only those legally classed as an employee can claim unfair dismissal

If someone earns below the lower earnings limit

From 5 December 2022, the law banning the use of exclusivity clauses also applies to employees and workers whose weekly income is below or equivalent to the lower earnings limit (LEL).

The government sets this limit each tax year. The lower earnings limit for 6 April 2023 to 5 April 2024 is £123 per week.

If you have any questions about the lower earnings limit, contact HM Revenue and Customs (HMRC).

If an employer includes an exclusivity clause that's against the law

The law banning the use of exclusivity clauses still applies even if the employer:

- has included an exclusivity clause in the contract
- says their employee has broken their contract by working for another employer

This is because an employer cannot enforce a clause that is against the law.

4. Flexibility clauses

Sometimes employers include 'flexibility clauses' in their employees' contracts. They're often called 'variation clauses'.

These clauses are intended to allow employers to change terms in the contract in certain circumstances. They can be general or specific.

For example, a general flexibility clause might say that an employer can change the terms of a contract, depending on the needs of the business.

A specific flexibility clause might say that an employer can change an employee's working hours, but only within the business opening hours.

Employers should make flexibility clauses as clear and specific as possible. This will help to avoid misunderstandings and reduce the risk of legal claims.

Using flexibility clauses to change a contract

Employers must only use flexibility clauses to make changes that are reasonable.

The employer might be in breach of the contract if they:

- try to make changes that are unreasonable
- fail to inform and consult employees and their representatives about any proposed change
- do not give reasonable notice for changes

This could be the case even if there's a flexibility clause that seems to allow the change.

For example, an employer is deciding whether it's reasonable to use a flexibility clause to change someone's work location. Things they should consider include whether:

- the new location is within a reasonable commuting distance
- the employee can drive

- there are public transport options available
- the employee has any mobility issues
- the employee has caring responsibilities that would be impacted by a longer commute
- to offset any extra costs for the employee from the change in work location
- the employee's work location is among the terms and conditions covered by a 'collective agreement' – this is an agreement with a recognised trade union
- there's any risk of discrimination

Find out more about:

- proposing employment contract changes
- if your employer proposes employment contract changes

Adding a flexibility clause to a contract

If an employer would like to introduce a flexibility clause, they would need to change the employment contract.

An employer must follow certain steps when changing employment contracts.

Employees have different options on how to respond if their employer proposes a change to their contract.

Find out more about changing an employment contract

Contact the Acas helpline

If you have any questions about flexibility clauses, you can contact the Acas helpline.

5. Employer and employee duties

Employers and employees have certain duties that are central to any employment contract. These are sometimes called 'imposed duties'.

The main duties are:

- duty of care
- duty of trust and confidence
- duty of fidelity

These duties:

- are crucial to a working relationship
- help employers and employees work together effectively
- also apply when an employee is not working but is still employed – for example, when they're on holiday or off sick
- cannot be overridden by any express term in the contract

If either the employer or employee breaches one of these duties, it can damage or even end the working relationship.

Duty of care

Employers have:

- a common law 'duty of care' towards their employees
- specific rules they must follow under health and safety law

This means employers must do all they reasonably can to protect their employees' health, safety and wellbeing at work.

This could include:

- providing a safe working environment
- doing risk assessments and taking action based on what they find
- doing everything they reasonably can to protect employees from discrimination and bullying
- take steps to help prevent work-related stress

Examples of how an employer might breach their duty of care include:

- pressuring employees to work excessive hours
- failing to provide the right training or equipment for carrying out work safely
- allowing staff to work who are unwell or do not have the right training – they could put themselves or others in danger
- not putting measures in place to prevent sexual harassment at work

If an employer breaches their duty of care

There is no standalone legal claim called 'breach of duty of care'.

However, there are likely to be other legal claims for situations where the employer breaches this duty. For example:

- claims where the employer has failed to protect an employee from discrimination
- breach of contract – an employee cannot make this claim to an employment tribunal while they're still employed, but they can make a claim to county court
- constructive dismissal – where the employee resigns because the breach is so serious they do not feel they can continue working for their employer

If an employee notices a health and safety risk

If an employee identifies a health and safety risk at work, they should:

- speak to their employer
- follow any procedure their organisation has for reporting these
- speak to a health and safety representative at work if they have any questions

Employees can also report health and safety issues to the Health and Safety Executive (HSE) or their local authority if:

- they've raised the issue with their employer
- their employer has not responded or taken any action

You can:

- find out about reporting a health and safety issue on the Health and Safety Executive website
- contact the Acas helpline, if you're unsure who to report health and safety issues to

Detriment relating to health and safety

An employer must not cause an employee or worker 'detriment' because they:

- reasonably believe being at work or doing certain tasks would put them in serious and imminent danger
- take reasonable steps over a health and safety issue, for example complaining about unsafe working conditions
- inform their employer about a health and safety issue in an appropriate way

Detriment means someone experiences one or both of the following:

- being treated worse than before
- having your situation made worse

Examples of detriment could be:

- an employer reduces someone's hours
- experiencing bullying
- experiencing harassment
- an employer turns down someone's training requests without good reason
- someone is overlooked for promotions or development opportunities

Employees and workers are also protected if they whistleblow about health and safety. Find out more about whistleblowing at work.

Duty of trust and confidence

Employers and employees have a 'duty of trust and confidence' towards each other.

They must:

- behave in a way that means they can trust each other
- treat each other with respect
- not behave in an entirely unreasonable way – for example, an employer deliberately failing to pay wages without agreement

If an employer breaches the duty of trust and confidence

If an employer breaches the duty of trust and confidence, their employee might be able to claim:

- breach of contract
- constructive dismissal – if it's a very serious breach

Examples of how an employer might breach this duty include:

- refusing or failing to look into an employee's grievance
- demoting an employee without a good reason

If an employee breaches the duty of trust and confidence

If an employee breaches this duty, their employer might take disciplinary action, which could lead to dismissal.

Examples of how an employee might breach this duty include:

- making false expenses claims
- stealing from their employer

Duty of fidelity

Employees have a 'duty of fidelity' towards their employer. It is sometimes called the duty of good faith.

This duty means employees must behave honestly and faithfully towards their employer.

Under the duty of fidelity, employees must not:

- make a secret profit
- work in competition with their employer
- share confidential information that they learn while working for their employer

This duty is especially relevant when an employer includes a 'restrictive covenant' in their employee's contract. This is a term stating that an employee cannot take certain actions that are in competition with the employer's business.

'Non-compete clauses' are a type of restrictive covenant.

Doing work for another employer

The duty of fidelity would not stop employees taking on extra work for a different employer.

However, they should consider whether:

- the work is in competition with their employer – for example, if a hairdresser sets up their own business and visits clients of the salon they work for
- the work is detrimental to their employer – for example, if someone works excessive hours for another employer and they're so tired it's unsafe for them to be at work

In both these circumstances, the employee might be breaching the duty of fidelity.

Contact the Acas helpline

Contact the Acas helpline for any questions about employer and employee duties or circumstances that relate to them.