United Kingdom

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Employment contracts – the formalities

1. Written statement

Under Section 1 of the Employment Rights Act 1996, all employees should be given a written statement of certain terms and conditions governing their employment within two months of commencing employment.[1] The written statement of terms and conditions does not necessarily constitute the whole contract of employment, as there can be additional written or implied terms in an employee's contract which are not covered in the written statement. Often, a contract and an employee handbook are used to provide the complete express terms.

Sections 1(3) and 1(5) of the Employment Rights Act detail the matters to be set out in the written statement. These include:

- the identity of the parties;
- the date on which the employment began;
- the date on which the employee's period of continuous employment began;
- the scale and rate of remuneration;
- the intervals at which remuneration is paid;
- terms relating to hours of work;
- terms relating to holidays; and
- job title or description of work and place of work.

The following particulars should also be provided or reference should be made to where they can be obtained:

- terms relating to sickness absence and payment during such absences;
- pension entitlement;
- the length of notice that the employee is entitled to give and receive to terminate the contract of employment;
- in the case of non-permanent or fixed-term contract, when the contract will cease;
- details of any collective agreement affecting the terms and conditions of employment;
- details of the disciplinary and grievance procedures applicable to the employee; and

1 Section 1 of the Employment Rights Act 1996.

- if the employee is required to work outside of the United Kingdom for more than a month, details of this employment and any terms and conditions regarding the employee's return to the United Kingdom.

An employee is also entitled to receive an itemised statement of pay and deductions with each payment of his wages or salary.[2]

2. Implied terms

Some terms are not expressly agreed, but are implied into the contract by common law or statute. Terms implied by common law on the employer include the following duties:

- to pay wages (and potentially also to provide work);
- to give reasonable notice;
- to indemnify an employee for expenses and liabilities incurred by the employee in the course of his employment;[3]
- to take reasonable care of the employee's safety and working conditions;[4]
- mutual trust and confidence;[5] and
- to take reasonable care when providing a reference.[6]

Terms implied by common law on the employee include the following duties:

- to give personal service;
- to give reasonable notice;
- to obey lawful and reasonable orders;[7]
- to exercise reasonable care and skill (and an indemnity for deviation from this);
- fidelity and good faith;
- not to disrupt the employer's business;
- not to compete;
- not to solicit the employer's customers;
- not to entice employees;
- to disclose wrongdoing;
- confidentiality;
- not to misuse the employer's property; and
- to account for a bribe, secret profits or secret commission.

Terms can also be implied into contracts where the court considers that they are necessary for the business efficacy of the contract or where they are so obvious that the parties must have intended them. This is known as the 'officious bystander' test.[8] A term may also be implied where the parties' conduct demonstrates that the term

2 Section 8 of the Employment Rights Act 1996.
3 *Re Famatina Development Corporation Ltd* [1914] 2 Ch 271.
4 *Wilsons & Clyde Coal Ltd v English* [1938] AC 57.
5 *Woods v WM Car Services (Peterborough)Ltd* [1983] IRLR 413, CA.
6 *Bartholomew v London Borough of Hackney* [1999] IRLR 246.
7 *Laws v London Chronicle Ltd* [1959] 2 All ER 285.
8 *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206.

must have been intended at the time the contract was entered into.[9] A term may also be implied by custom and practice. In order to be binding, the custom or practice must be "reasonable, notorious and certain"[10] and followed because of a sense of legal obligation to do so.[11]

Terms can also be implied by statute, including the following:

- equality clauses – equal terms and conditions between men and women engaged in like work, work of equal value or work rated as equivalent;[12]
- minimum notice period – both employee and employer are entitled to minimum periods of notice to terminate the contract;[13] and
- limits on working time – unless an employer has agreed otherwise in writing, working time must not exceed 48 hours per week over the appropriate reference period.[14]

The Contracts (Rights of Third Parties) Act 1999 allows third parties to enforce a term of a contract where the contract indicates that they are to receive a benefit under it. However, a third party can enforce rights in an employment contract only against the employer and not against an employee, worker or agency worker.

Unless a contract is expressed to be for a fixed-term duration, it will be considered to be for an indefinite period, terminable in accordance with the notice provisions provided in the contract.

A 'fixed-term contract' means a contract of employment which will terminate on the expiry of a fixed-term, the completion of a particular task or the occurrence or non-occurrence of a specific event. Examples of fixed-term contracts include:

- contracts covering a permanent employee's sickness or maternity leave, which will terminate when the permanent employee returns to work;
- contracts linked to a particular stream of funding used to pay the employee's salary, the expiry of which will terminate the contract;
- contracts due to expire on completion of a particular project; and
- seasonal contracts to take account of seasonal workflow.

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002[15] places a four-year limit on the use of successive fixed-term contracts. After this four-year period, the contract will automatically take effect as a permanent contract, subject to limited exceptions, unless employment on a fixed-term basis can be objectively justified.

A probation period represents a 'trial period' at the start of employment, during which time the employer assesses the employee. After completion of this trial period, the employee is often informed as to whether the appointment will be made permanent. On occasion, the trial period can also be extended for an additional

9 *Wilson v Maynard Shipbuilding Consultants AB* [1977] IRLR 491.
10 *Bond v CAV Ltd* [1983] IRLR 360; *Henry v London General Transport Services Ltd* [2001] IRLR 132.
11 *Solectron Scotland Ltd v Roper* [2004] IRLR 40.
12 Section 1 of the Equal Pay Act 1970.
13 Section 86 of the Employment Rights Act 1996.
14 Regulation 4(1), of the Working Time Regulations 1998.
15 SI 2008/2776.

period. The scope and terms of any probation period are governed by the individual's contract of employment, but the period will normally last from three to six months and may involve either formal or informal assessments. Employees may not be entitled to all contractual benefits during the probationary period, notably membership of a pension scheme. During the probationary period, both employer and employee have the right to terminate the contract, normally on a shorter notice period (commonly one week).

3. Changes to working conditions, tasks, title and location

The position under common law is that any change to working conditions, unless entirely beneficial to the employee and comparatively minor – for example, a pay increase in line with the usual annual increments – cannot be made without the employee's consent. Consent can be either expressed or implied. This is line with normal contractual principles.

On occasion, this rule can be avoided by the inclusion of an express provision allowing the employer to have a measure of general or specific flexibility (eg, regarding either employee location (mobility clause) or duties).[16] In *Bateman v Asda Stores Ltd*, a clause allowing a variation of terms without the employee's consent was even found to be enforceable in the context of changing pay terms. This case was highly fact specific and the employees were not found to be financially disadvantaged by the change. However, if such provisions are too wide or unreasonable, they are unlikely to be enforceable.

On occasion, an employer can rely on tacit consent if the employee continues to work without inferring any objection to the proposed new terms. In *Jones v Associative Tunnelling Co*[17] the Employment Appeal Tribunal (EAT) held that where a proposed change will not take effect until a future date, the employer should not safely rely on the employee's tacit consent, as the employee can notify the employer of his objections to the proposed change only when the term is implemented.

Employees who object to variations in their contracts of employment may be dismissed and then immediately re-engaged on the new terms. If there are valid economic reasons for the change and a fair procedure is followed, the dismissal should be regarded as fair. However, in *Greenaway Harrison Ltd v Wiles*[18] the EAT held that a threat by an employer to terminate an employee who refused to accept changes to his working hours was an anticipatory breach of contract. In contrast, in *Kerry Foods Ltd v Lynch*,[19] which was based on similar facts to *Greenaway*, the EAT held that a dismissal on notice could not constitute a breach of the implied term of mutual trust and confidence, stating that "an employer's service of a lawful notice of termination coupled with an offer of continuous employment on different terms cannot of itself amount to a repudiatory breach of contract". The EAT distinguished this case from *Greenaway*, which was not based on the trust and confidence issue.

Many employment contracts include a clause allowing the employer to amend

16 UK EAT/0221/09.
17 [1981] IRLR 477.
18 *Peake v Automotive Products Ltd* [1994] IRLR 380.
19 UKEAT/0032/05.

the employee's duties, working methods or place of work; and even in the absence of this clause, an employee cannot insist on doing his job in a certain way or at a set location.

An employee is under a duty at common law to obey the lawful and reasonable orders of his employer. This implied duty will not normally form part of the contract of employment and consequently can be altered unilaterally by the employer.[20] An employee is not bound by an illegal order from his employer – for example, to drive a lorry without third-party insurance[21] or to falsify the account books.[22] Reasonableness will be a question of degree. In *Ottoman Bank v Chakarian*[23] the Privy Council held that it was unreasonable for an employee to comply with an order to stay in Turkey, where he had been sentenced to death. In comparison, in *Walmesey v Udec Refrigeration Ltd*[24] the tribunal did not uphold the employee's refusal to go to Wexford, Ireland, as they found the employee's argument that Wexford was an IRA stronghold to be unproven.

An instruction may not be regarded as reasonable if it is inconsistent with the nature of the contract. In *Price v Mouat*[25] a highly paid buyer did not have to comply with an instruction to carry out a manual task in a warehouse.

An employee is not relieved from the duty to obey lawful and reasonable orders when he is on sick leave, unless the illness prohibits compliance.[26] An employee may need to adapt to new working methods after appropriate training.[27] The employer's right to require the employee to obey instructions may be limited by the implied term of mutual trust and confidence.

In accordance with Section 1(4)(h) of the Employment Rights Act, the place or places of work should be detailed in the employment contract. A mobility clause may detail the area within which the employee can work. The existence or otherwise of a mobility clause will depend on the facts of the case.

A mobility clause is not a term implied by law and is likely to be implied only on the grounds of business efficacy.[28] In *Jones v Associated Tunnelling Co Ltd*[29] the EAT implied a term allowing the plaintiff's employer to instruct him to work at any place within reasonable daily travelling distance from his home, on grounds of business efficacy.[30] Mobility clauses might also not be as restrictive for a senior member of staff.[31]

In *United Bank Ltd v Akhtar*[32] it was held that a mobility clause (whether express or implied) cannot be exercised in such a way as to breach the implied duty of trust and confidence. In that case it was also held that there was an implied duty, which

20 [1997] IRLR 105.
21 *Gregory v Ford* [1951] 1 All ER 121.
22 *Morrish v Henlys (Folkestone) Ltd* [1973] ICR 482.
23 [1930] AC 277.
24 [1972] IRLR 80.
25 (1862) 11 CBNS 508.
26 *Marshall v Alexander Sloan & Co Ltd* [1980] ICR 394.
27 *Cresswell v Board of Inland Revenue* [1984] ICR 508.
28 *Parau v Iceland Frozen Foods plc* 1996 IRLR 119.
29 [1981] IRLR 477.
30 See also Courtaulds Northern Spinning Ltd v Sibson [1988] ICR 451.
31 *Little v Charterhouse Magna Assurance Co Ltd* [1980] IRLR 19.
32 [2000] WL 456.

was not to be breached, to provide reasonable notice of relocation and not, by exercising a mobility clause, to make performance of the employment contract impossible.

In *Millbrook Furnishing Industries Ltd v McIntosh*[33] the EAT made a non-binding comment that, subject to it being on a temporary basis and with no reduction in wages, an employer could oblige an employee to transfer to other suitable work where the "stresses or the requirements of [the] business" necessitated it.[34]

33 [1981] IRLR 309.
34 This case was followed in *Luke v Stoke on Trent City Council* UKEAT/0344/06.