

Chapter 2: The Nature and Content of the Contract of Employment

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Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the ILEX syllabus:

- 2 Understand the nature of the contract between employer and employee
- 3 Understand the main terms of a contract of employment

2.1 Introduction

As stated at **1.2**, a contract of employment is a “special case” of the law of contract. A contract of employment is like any other contract in that it must encompass offer, acceptance, consideration and intention to create legal relations. As with other types of contract, a contract of employment can be invalidated if it is proved that the parties were negotiating at cross-purposes – such that there was no “meeting of minds” – or if one of the parties is found to have misled the other in order to induce the contract to be made. A common example of this is a person who “enhances” his CV by inventing a qualification or experience that he does not really possess.

This chapter examines the nature and content of the contract of employment. It will discuss:

- the (limited) requirements as to the form of a contract of employment;
- the express and implied terms of a contract of employment;
- the legal importance of a written statement of terms of the contract – this is not the contract itself;
- some of the main statutory rights that are afforded to employees by their contracts of employment.

2.2 The form of the contract of employment

There are no legal requirements about the form that a contract of employment must take. A contract of employment follows the general rule that **writing is not needed** to create a valid contract, and **s230(2) ERA 1996** states that contracts of employment can be *oral or in writing*. Nevertheless, to avoid disputes, it is desirable for the parties to record the terms in writing.

A contract of employment commences as soon as the employee starts work (sadly for employees, this almost always pre-dates the date of first wages or salary!), even if there is no written evidence of any agreement that he will do so. **s1(1) ERA 1996** provides that the employer must provide a *written*

statement of particulars of employment within two months of the employee starting work. This statement is **not** the contract of employment – it is simply evidence of its terms. The statement is discussed further at **2.4**.

2.3 The terms of the contract of employment

There are two main sources of the terms of the contract of employment. These are:

- **express** terms, which the parties have agreed between themselves, either orally or in writing; and
- **implied** terms, which are part of the contract either because:
 - a **statute** specifies that all contracts of employment should contain an implied term of a particular type; or
 - the **common law** has established that the terms are appropriate for such contracts.

Express terms may override terms implied by the common law. The parties are not at liberty to exclude a term that is implied by statute, although they may improve upon it – for instance, an express contractual term may provide that an employee is entitled to **more** notice of termination of his employment than the statutory minimum described at **2.3.2.3**, but **not less** than this.

2.3.1 Express terms

The express terms of the contract are determined by looking at what the parties said or wrote when they made the agreement. Obviously, it is easier to establish what express terms were agreed if the contract is in writing.

In *Tayside Regional Council v McIntosh [1982]* McIntosh, a vehicle mechanic, was dismissed when he lost his driving licence. Although his written statement did not refer to the need for a licence, it had been mentioned in the job advertisement and at the interview. The tribunal held that it was an express term of the contract and therefore his dismissal was fair.

The courts may be asked to **interpret the terms** expressly agreed by the parties. To assist them in this, the courts may look at what is the general practice in the industry concerned.

Express terms may include a wide range of matters. The following matters are often the subject of express terms.

- (1) **Intellectual property rights:** the contract may specify that anything that the employee invents, discovers, creates or writes during his employment becomes the property of the employer.
- (2) **Garden leave provisions:** some employees (usually those with important or sensitive knowledge or contacts) are entitled to “garden leave” – that is, a period during which they do not continue to do their present jobs (and so have the time to tend their gardens!), but continue to receive their **full pay and benefits** – when they have given or received notice of termination of employment. The purpose of garden leave is to protect the employer’s

interests by ensuring that employees remain bound by their implied duties to the employer (these terms will be discussed at **2.3.3.2**) for a period after they have actually ceased to do their jobs.

(3) **Restrictive covenants:** during his employment, an employee may not work for one of his employer's competitors but, if the employer wishes to prevent an employee from working for a competitor as soon as he has left his job, this must be the subject of an express term. These terms are theoretically **unlawful**, because they restrict the individual's right to earn his living by selling his labour, and the courts will normally enforce them **only if** they are **reasonable** and only as restrictive as is **necessary to protect the employer's legitimate interests**.

What is reasonable and necessary will be a **question of fact** in each case: in *Littlewoods Organisation Ltd v Harris [1978]* the Court of Appeal held that it was reasonable to prevent a senior employee of a mail order business from working for Great Universal Stores (its main rival) throughout the whole of the UK for one year after leaving employment, whereas in *Office Angels Ltd v Rainer-Thomas and Another [1991]* a clause prohibiting employment within a radius of 1 km from an employment agency's City of London premises was not enforceable because it was not necessary to protect the employer's business.

(4) **Conditional training:** an employer may specify that he will pay for an employee to attend a specified training course, provided that the employee works for him for a specified period after the training is completed.

2.3.2 Terms incorporated by statute

The amount of employment-related legislation has increased very significantly in recent years, partly in response to changing social conditions and partly in response to EU law. The rights of natural and adoptive parents and carers, for instance, have increased enormously, although the details of these rights are beyond the scope of this Unit.

This section considers the following rights that are incorporated by statute into contracts of employment:

- rights relating to working time;
- rights relating to pay;
- the right to a minimum period of notice.

2.3.2.1 Rights relating to working time

The **EU Working Time Directive** was implemented in the UK by means of the **Working Time Regulations 1998 (WTR 1998)**. **WTR 1998**, as amended, apply to all workers, other than those who are genuinely self-employed, the armed forces, police and civil protection services.

WTR 1998 provide that no one should work more than a **48-hour average** working week. This average will usually be calculated over a period of **17 weeks**.

Employers must take all reasonable steps to ensure that working time, including overtime, does not exceed 48 hours in **any seven-day period**.

Adult workers must have an **uninterrupted rest period** of not less than **24 hours** in each **seven-day period** or, by arrangement with the employer, 48 hours' rest in each 14-day period.

An adult is entitled to a **rest break** of at least **20 minutes**, away from his workstation, in each day during which he works for at least **six hours**.

An individual may agree in writing to "**opt out**" of the 48-hour weekly limit.

"**Young workers**" aged 16 and 17 may not work more than **40 hours** per week.

All workers have an annual leave entitlement of 5.6 weeks, including the eight bank holidays. There is no qualifying period – the right to paid leave accrues, during the first year of employment, at the rate of one-twelfth of the annual leave entitlement on the first day of each month. The employer controls when this leave may be taken, but must permit the worker to take all of it during the "leave year" – which can begin on any date – in which it was accrued.

This provision gives a total of 28 days' annual leave (5.6 weeks × 5 days) for someone working five days per week. Someone working four days per week is entitled to 22.4 days' paid annual leave; employers may round this up (to 23 days) but cannot round it down (to 22 days). **WTR 1998**, however, impose a maximum statutory entitlement of 28 days. People working six days per week have the cap imposed, with the result that they are entitled to fewer working weeks' holiday (28 days for them is a total of roughly 4.5 weeks) than are people who are working five days per week.

The ECJ ruled, in *Federatie Nederlandse Vakbeweging v Staat der Nederlanden [2006]* that it is unlawful for pay to be given in lieu of holiday allowance, even when the employer's "leave year" has expired – in such cases, the outstanding days of the allowance must be carried forward into the following year.

Employees who are on long-term sick leave continue to accrue an entitlement to annual leave. The House of Lords' decision in *Revenue and Customs Commissioners v Stringer and Others [2009]* was based on three points that had been decided in the ECJ. These were that:

- entitlement to the statutory minimum amount of paid holiday (i.e. 20 days: the 28-day total, minus the eight bank holidays) **does** accrue whilst an employee is absent on sick leave;
- workers on long-term sick leave are not prevented from taking paid annual leave during sick leave, provided that they have the opportunity to take their paid annual leave during another period; and
- after termination of the contract, workers are entitled to a payment to compensate for any accrued holiday that they have not taken.

The House of Lords' decision did not give an opinion on some points of law, so these still remain undecided. The only new point on which a clear decision was given is that claims for unpaid holiday pay – after a holiday year has ended or at the end of a person's employment – can be brought as claims for unauthorised deductions from wages, as well claims for breach of **WTR 1998**. This means that a claim can be brought within three months of the last deduction, rather than each deduction being treated as a separate claim. This will significantly increase the value of claims based on a series of unlawful deductions.

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Published in 2011 by:
ILEX Tutorial College Ltd
College House
Manor Drive
Kempston
Bedford
United Kingdom
MK42 7AB

British Library Cataloguing in Publication Data

A catalogue record for this manual is available from the British Library.
ISBN 978-1-84256-541-4