

# Whitepaper – Contracts of Employment

The contract of employment is the legal foundation of the employment relationship between the employer and employee. As such it is important that employers ensure that they issue written contracts of employment which are clear and unambiguous.

Such clear and unambiguous written contracts of employment can be invaluable to employers in helping to avoid disputes with employees about their terms and conditions of employment. Clearly, if terms and conditions are agreed orally, or agreement has not been reached at all on specific matters, there is a greatly increased risk of dispute and litigation.

## Formation of the Contract of Employment

A contract of employment will be formed when there has been an offer on the part of the employer and acceptance of that offer on the part of the prospective employee. Obviously, a contract of employment should be used only where there will be an employer/employee relationship. There is a distinction between a **contract of service**, which is a contract of employment and a **contract for services**, which might apply to a subcontractor or freelance worker.

## Job Offer

A job offer is an expression by an employer of a willingness to be legally bound in a contract of employment with the prospective employee. Such an offer need not be in writing (although a written offer is advisable) and can be made orally or, in certain circumstances, by conduct on the part of the employer.

Employers often wish to attach conditions to any job offer made by them or on their behalf e.g. a requirement to provide references or to provide proof of a qualification or a work permit. In such circumstances, the employer should also consider placing a time limit on the period in which the prospective employee must meet the conditions. A conditional offer cannot be accepted by the prospective employee until he or she has fulfilled the particular conditions attached to the offer.

The employer can withdraw the offer made at any time before acceptance by the prospective employee. However, a withdrawal will only be regarded as effective once it has reached the prospective employee. If an offer is withdrawn after it has been accepted, the employee may have a claim for breach of contract.

## Acceptance of the Job Offer

The offer made by the employer is open for acceptance within any time limit specified in the offer or within a reasonable period of time if no time limit has been specified.

If the prospective employee appears to accept the offer, but alters one of the terms, e.g. by requiring additional holidays then there is in actual fact no acceptance of the offer but merely a continuation of negotiations.

## Terms of the Contract of Employment

A contract of employment will normally have been formed when there has been a valid offer on the part of the employer and a valid acceptance on the part of the prospective employee. This will be the case even if the parties have not negotiated all the terms of the contract or reduced the terms to writing. If there are gaps in the contract these may be filled in by implied terms. However, reliance on implied terms will increase the chances of a dispute and could leave the parties at the mercy of the court or tribunal.

Any agreement reached must, at this point, be sufficiently precise to enable the key terms to be identified e.g. if there is an agreement on most matters but no wage has been fixed then there is no contract of employment. If, however, despite the fact no wage has been fixed, the agreement does provide some method for deciding on a wage rate then there will be a valid contract. Contracts of employment will contain express, incorporated and implied terms.

## Express Terms

Express terms are terms that have been explicitly agreed between the parties. They may be in writing or oral.

Providing written terms is the clearest and most easily understood method of regulating contractual terms. While there is no legal requirement to reduce a contract of employment to writing there is a requirement on employers to provide a written statement of particulars to each of their employees within eight weeks of the employee's starting date.

While express terms are generally preferable to implied terms, oral express terms are obviously very unreliable. Proof of a contract term is based on the balance of probabilities, so an employer that deliberately chooses not to put a term in writing is opening itself up to potential difficulties.

## Incorporated Terms

Often the provisions of another document are incorporated into the contract of employment e.g. a sick pay scheme, an employee handbook or collective agreement. This has the effect of making the terms of the incorporated document terms of the contract of employment.

It is important that when incorporating other documents into the contract of employment that the employer makes it clear whether future versions of the document are to be automatically incorporated.

## Implied Terms

Generally, an implied term cannot override an express term. However, an exception to this rule exists where a term implied by statute replaces any lesser contractual benefit e.g. where the statutory notice to terminate a contract is 5 weeks but the contract of employment provides only for a month's notice then the statutory notice will prevail.

Implied terms fill in gaps in the express terms of the contract. Whether or not a term is to be implied is a matter for the court or tribunal. They will normally do so in the following circumstances:

- When the implied term is necessary to give business efficacy to a contract. E.g. where the contract is silent on the place of work a tribunal may imply a term that the employee may be required to work anywhere within a reasonable commuting distance of his home.
- When a term may be implied from the conduct of the parties. e.g. an employee has been off sick in the past but never received any pay in excess of S.S.P a tribunal may hold the parties conduct implies there is no right to sick pay
- When a term may be implied from a custom or practice in the particular workplace, trade or region. e.g. where the contract is silent on whether a construction worker may be required to work away from home a tribunal may hold there is an implied term that the employee can be sent anywhere to work as it is recognised in the construction industry that mobility is a feature of employment.

Implied terms have frequently been used by the court to develop the law relating to employment contracts e.g. the duty on both parties to treat the other with trust and respect, the duty on the employer to provide a safe system of work and the duty on the employee to exercise reasonable skill and care in carrying out his job.

## Written Statement of Particulars of Employment

Employees (inc. apprentices) are entitled to a written statement of the particulars of employment by the end of the second month after employment commenced.

It is important to note that the written particulars are simply evidence of the employer's view of the terms of the contract of employment. However, in the absence of any other evidence, the written particulars are very powerful evidence. As written particulars are evidence of the contract's terms there will be an assumption that an item included in them is intended to be contractual unless there is a contrary indication.

If there is any conflict between the terms in the contract and those in the written particulars, those in the contract will govern the situation e.g. if a prospective employee accepts an oral offer of employment indicating he will receive a salary increase after obtaining a certain qualification but then signs written particulars which vary this condition it is the terms of the oral contract which will prevail. In this situation, the practical difficulty for the employee would be in proving the terms of the oral contract.

If the written particulars are to be the only written evidence of the contract terms, then the employer should consider whether further information needs to be included. For instance, it may be helpful to include details on confidentiality and restraint clauses.

To be legally compliant, certain information must be provided in the written statement of particulars of employment. Specified terms must be included in one main document (known as the principal statement). Other terms may be contained in a separate document or documents.

Terms that should be included in the main document:

- Names of the employer and employee
- Date when employment began, date on which the employee's continuous employment began.
- Scale or rate of remuneration or the method of calculating the remuneration. Intervals at which remuneration is paid.
- Terms and conditions relating to hours of work.
- Terms and conditions relating to entitlement to holidays, including public holidays and holiday pay, in such a manner as to allow them to be precisely calculated.
- Job title.
- Place of work or an indication that an employee is required or permitted to work at various locations.

The main document should also include a note:

- Specifying any disciplinary rules applicable to the employee or referring him or her to the provisions of a document which is reasonably accessible to him or her and specifies such a procedure.

- Specifying any procedure applicable to the taking of disciplinary decisions relating to the employee, or a decision to dismiss him or her, or referring to the provisions of a document reasonably accessible to him or her which specifies such a procedure.
- Specifying a person to whom the employee can apply if dissatisfied with any disciplinary decision.
- Specifying a person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his or her employment and the manner in which any such application should be made.

Certain other terms may be provided in separate documents:

- Terms and conditions relating to incapacity for work due to sickness or injury, including any provision for sick pay.
- Terms and conditions relating to pensions and pension schemes.
- Length of notice the employee is required to give.
- Where the employment is not intended to be permanent, the length it is intended to last.
- Any collective agreements, which directly affect the terms and conditions of employment.
- Where the employee is required to work outside the UK for a period of one month or more, details of the time they are to work abroad, the currency they will be paid in, any additional remuneration payable and any benefits provided by reason of working outside the UK and any terms relating to the employee's return to the UK.

## Future Considerations

Under the Good Work Plan, from 6 April 2020, the government will legislate to give all workers the right to a written statement of terms (a right which is currently only available to employees) and also that every new employee and worker will have the right to the written statement of particulars on or before the first day of employment, rather than within two months of employment starting.

It will also add to the information that must be given in the written statement, to include information on the length of time a job is expected to last, the notice period, eligibility for sick leave and pay, other rights to leave, any probationary period, all pay and benefits, and specific days and times of work.

**This information is provided for general reference purposes only.  
If you have a specific enquiry relating to this topic please contact Wirehouse on:**

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