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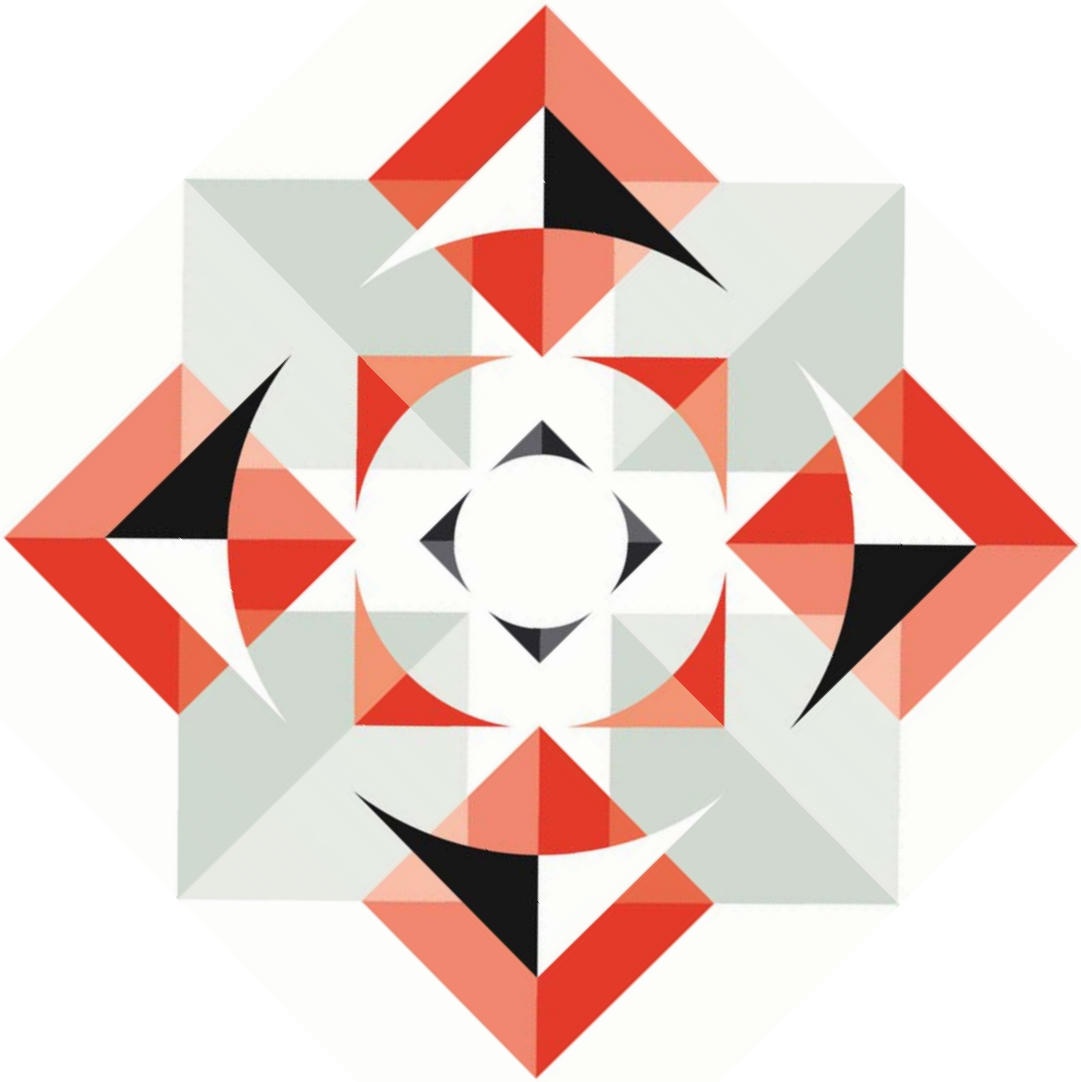
Contracts of employment



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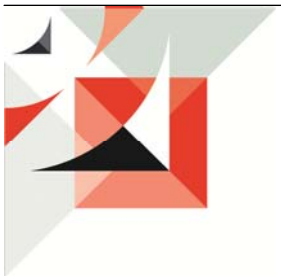

Introduction

A contract of employment can be a written document, a verbal agreement, or a mixture of the two. Even where the employer and employee have agreed express terms, certain terms are always implied into every contract of employment. Understanding the full effect of the contract of employment at the outset of the relationship is important because it forms the basis of many of the legal rights and obligations which govern the employment relationship.

What is a contract of employment?

A contract of employment is a legally binding agreement between an employee and his or her employer which forms the basis of the employment relationship. The contract sets out both parties' rights, responsibilities and duties - collectively called the "terms" of the contract.

Sources of contractual terms

A common misconception is that a contract of employment consists only of written terms set out in a single document. Many contracts consist of a patchwork of terms from different sources, which include:

> express terms (either verbal or written)

> implied terms

> terms incorporated from other documents

Express terms

Express terms are terms that have been specifically agreed between the parties (either orally or in writing). It is possible (although undesirable) for a contract's express terms to be entirely oral, provided that there is sufficient certainty over what was agreed. However, in practice, it is best to put a contract in writing as this provides certainty and will help to prevent disputes as to what was agreed further down the line.

Implied terms

Implied terms are terms that have not been written down or orally agreed, but are implied into the contract.

Terms can be implied in a number of ways:

> **Terms implied in fact:** Terms may be implied in this way to fill a "gap" in the contract's drafting. This might be the case because the term is necessary in order to give business efficacy to the contract, or if the term is "something so obvious that it goes without saying". Equally, a term may be implied from the parties' conduct if that conduct clearly shows that the term must have been intended at the time the contract was entered into.

> **Terms implied by custom and practice:** This may happen when the terms represent an established practice (e.g. repeatedly paying an annual Christmas bonus of a certain amount). However the practice must be "reasonable, notorious and certain".

> **Terms implied by law:** Some terms are implied in every contract of employment either by case law or statute. The most important implied term is the mutual duty of trust and confidence between the employer and employee. This is most frequently cited against employers as the basis of a constructive dismissal claim or a claim for damages (i.e. where it is alleged that the employer has acted in a manner likely to destroy or seriously damage the relationship of trust and confidence).

Terms incorporated from other documents

In certain circumstances terms can be incorporated from other documents. These could be the offer letter or from an employer's policies and procedures (e.g. sickness absence policy, e-mail and internet policy, holiday policy etc), or a collective agreement (such as a negotiated agreement between an employer and a trade union or staff association).

However, terms included in these types of documents are not always incorporated into the contract of employment. Sometimes they will be non-contractual and, in many cases, an employer may not want them to be contractual.

Non-contractual terms

It is important to make it clear if particular terms or documents are intended to be non-contractual. Non-contractual terms can be changed more easily and this gives an employer some flexibility if, in particular circumstances, it is not possible to follow a particular policy or procedure to the letter. For example, if a grievance policy is contractual, an employee could argue that the employer has breached his or her contract by failing to provide a response to a grievance within the time period set out in the policy.

Examples of policies or procedures which should normally be non-contractual include maternity, paternity, and other family-friendly leave policies, disciplinary and grievance procedures, whistleblowing, data protection, communications and IT, travel, expenses and

anti-bribery policies. It is common for employers to put these types of documents in a "Staff Handbook" or similar which makes clear that the policies/procedures are not contractual, do not create rights or obligations, and can be amended at any time.

Written statement of terms

Although the contract of employment does not have to be in writing, every employer must give each employee a written statement setting out their main terms and conditions within two months of the start of the employment relationship (often known as a "section one statement"). Although the written statement is not the contract of employment itself, it provides evidence of the express terms agreed between the parties.

The key particulars which must be given in the written statement include:

- name of the employer and employee
- date the employment began
- date the employee's period of continuous employment began (in some circumstances employment with a previous employer counts)
- remuneration (scale, rate or method of calculation), and intervals at which remuneration is paid (weekly, monthly etc)
- hours of work
- any terms and conditions relating to:
  - holidays (including public holidays) and holiday pay - the detail given must be sufficient to enable the employee's entitlement to holiday to be precisely calculated;
  - sickness and sick pay;
  - pensions and pension schemes;
- length of notice required to terminate the contract
- job title or a brief description of the work the employee is employed to do
- place (or places) of work
- where the employment is non-permanent, the period for which it is expected to continue (or, if it is for a fixed term, the date when it is to end)
- any collective agreements which directly affect the terms and conditions of employment
- certain additional information where the employee is required to work outside the United Kingdom for more than one month

The statement must also give basic details of the disciplinary rules applicable to the employee and specify any disciplinary and grievance procedures by reference to separate documents, usually contained in a Staff Handbook.

Other terms to consider

Although an employer is not legally obliged to provide any additional information beyond the section one statement, it is wise from a commercial perspective to include other clauses which can provide greater protection and flexibility for an employer's business. For example:

- **Payment in lieu of notice (often referred to as a "PILON clause")**: This type of clause allows an employer to lawfully terminate the contract of employment immediately provided that the employee receives payment for his or her notice period. This may be an attractive option if the employment relationship has deteriorated and the employer wants to achieve a clean break quickly.
- **Garden leave**: A garden leave clause allows an employer to require an employee to stay away from the workplace during the notice period (often requiring the employee to stay at home). Employers often put an employee on "garden leave" if there are concerns that the employee might intend to compete with the business. The employee continues to be employed during the period of garden leave and so cannot start work for a competitor during this period. A garden leave clause may be used alongside restrictive covenants in order to maximise protection for the employer's business (see below).
- **Restrictive covenants**: These terms restrict an employee's activities after employment has ended. There are several types of restrictive covenants:
  - non-solicitation covenants (e.g. prohibiting the employee from actively trying to take customers or employees away from the ex-employer);
  - non-dealing covenants (e.g. prohibiting the employee from dealing with the ex-employer's customers); and
  - non-compete covenants (e.g. prohibiting the employee from working for a competitor).

  However, these clauses must be drafted very carefully to ensure that they can be enforced. The covenant must be no wider than is reasonably necessary to protect the employer's legitimate interests. What is "reasonable" depends on the particular business and the employee's role. (See our Inbrief guide on Protecting the business for further information).

  Confidentiality: An employee has a duty to keep the employer's affairs confidential. However, after employment has ended the implied duty of confidentiality only protects "trade secrets". It is common, therefore, for employers to expressly extend an employee's confidentiality obligations beyond the termination of the employment relationship.

The relevance, value and effectiveness of these additional terms should be assessed on a case by case basis. Particular consideration should be given to the nature of the business and the employee's responsibilities and seniority.

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