

BACK TO BASICS

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SECTION ONE

THE EMPLOYMENT CONTRACT

There is no legal requirement for the contract of employment to be in writing

Written statement of terms and conditions of employment

Express and implied terms

WRITTEN STATEMENT OF TERMS

Section 1 of the Employment Rights Act 1996 (“ERA 1996”) (as amended by the Employment Act 2002 (“EA 2002”))

Within two months

- (a) identity of the parties;
- (b) date employment began;
- (c) date continuous employment began (taking into account any relevant employment with a previous employer);
- (d) scale or rate of remuneration and intervals of pay;
- (e) hours of work;
- (f) any terms relating to:
 - (i) holidays and holiday pay;
 - (ii) sickness and sick pay;
 - (iii) pension and pension schemes;
- (g) length of notice required to determine the contract;
- (h) in the case of non-permanent employment, the period for which it is expected to continue or, if it is a fixed term, the date it is to end;
- (i) job title or a brief description of the work;
- (j) place or places of work;
- (k) particulars of any collective agreements which directly affect the terms and conditions of employment;

- (l) where employees are required to work outside the UK for a period of more than one month, the period of such work, currency in which payment is made, benefits provided and terms relating to the return to the UK;
- (m) details of the disciplinary and dismissal rules and grievance procedures – it is important to state that these are not contractual and they should be set out in a separate, easily accessible document;
- (n) whether a contracting out certificate is in force in relation to the pension scheme.

Notify of any changes - in writing within one month

Two exceptions

Failure to provide

Implied terms

Terms implied by statute

These include:

- Working Time Regulations 1998
- National Minimum Wage Act 1998
- The “equality clause” arising under the Equal Pay Act 1970

Terms implied by common law

Examples of these include:

Employer’s Duties

- Duty to pay wages and provide work
- Duty to indemnify employee
- Duty to take reasonable care of the employee’s safety and working conditions
- Duty of mutual trust and confidence
- Duty to take reasonable care in giving references

Employee’s duties

- Duty to give personal service

- Duty to obey reasonable orders
- Duty of reasonable care and indemnity
- Duty of fidelity or good faith
- Secret profits
- Competition
- Conflict of interest and duty
- Trade secrets and confidential information

Other implied terms

CONTRACTS OF EMPLOYMENT

Contract of employment may be oral, written, or partly oral and partly written

Advisable to be in writing

Clauses which should be considered for inclusion in a contract.

- (1) Duration clauses
 - (a) Indefinite contracts
 - (b) Fixed-term contracts
 - (c) Continuous employment

- (2) Duties and mobility
 - (a) Job title
 - (b) Duties
 - (c) Place of work and mobility

- (3) Remuneration, illness and holidays
 - (a) Pay, benefits and commission
 - (b) Deductions
 - (c) Sick pay
 - (d) Holidays and holiday pay

- (4) Pension

- (5) Inventions and discoveries

- (6) Confidentiality
 - (a) During employment
 - (b) After employment

- (7) Restrictive covenants

- (8) Disciplinary and grievance procedures

- (9) Surrender of papers

- (10) Other issues include
 - (a) A PILON clause
 - (b) A whistle-blowing policy
 - (c) Computer/telephone usage policy
 - (d) An equal opportunities policy
 - (e) A health and safety policy
 - (f) Family friendly policies
 - (g) A flexible working policy

SECTION TWO

DISCIPLINE UNDER THE NEW ACAS CODE

The Employment Act 2008 (EA 2008) introduces a new regime from the 6th April 2009 which repeals the statutory dispute resolution procedures under the Employment Act 2002 and the associated Employment Act 2002 (Dispute Resolution) Regulations 2004

Polkey v A E Dayton Services [1987].

Increase or reduce awards by up to 25%

ACAS Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code)

Why is it important to follow the ACAS Code?

It can avoid an unfair dismissal claim

It can affect the level of compensation

When does the ACAS Code apply?

The Code applies to misconduct and poor performance cases

How should misconduct or poor performance be handled?

The employer should investigate the issues

The employer should inform the employee of the issues in writing

There must be a disciplinary meeting or hearing

The employer should inform the employee of the decision in writing

The employee has a right of appeal

How has the law changed?

Best practice advice may change

The law on unfair dismissal, time limits and compensation has changed

When does the new regime apply?

Potential headaches

Involving employees in developing procedures

Evidence at disciplinary hearings

Reviewing the charges and evidence

Allowing the employee to call witnesses

Appeals against warnings

Only claims by employees are affected

There will be uncertainty over compensation

Practical steps

For employers

- Involve employees and/or their representatives in developing any new disciplinary procedures, and make sure the procedures are transparent and accessible to employees.
- Manage conduct and performance issues pro-actively before they get to a formal disciplinary stage.
- Investigate issues thoroughly. Even if the employee has attended an investigatory interview, always hold a disciplinary hearing once all the evidence is available, and allow the employee to put their side of the story (including calling witnesses unless this is unreasonable), before making any decision.

- Keep written records, including minutes of meetings.
- Communicate decisions effectively and promptly, setting out reasons.

For employees

- Make every effort to attend meetings and consider bringing a companion.
- Submit a written appeal if not satisfied with the outcome and set out the reasons why not.
- Be aware of the time limit for bringing a claim if the appeal is not successful or if the employer does not deal with it promptly.

SECTION THREE

GRIEVANCE UNDER THE NEW ACAS CODE

The Employment Act 2008 (EA 2008) introduces a new regime from 6 April 2009. It repeals the statutory dispute resolution procedures under the Employment Act 2002 (EA 2002) and the associated Employment Act 2002 (Dispute Resolution) Regulations 2004 (the Dispute Resolution Regulations).

Increase or reduce awards by up to 25%

New ACAS Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code).

Why is it important to follow the ACAS Code?

It can avoid a potential claim

It can affect the level of compensation

How should grievances be handled?

The employee should raise the grievance in writing

The employer should hold a meeting and investigate the complaint

The employee may bring a companion

The employee has a right of appeal

How has the law changed?

Best practice advice should not change significantly

The rules on admissibility, time limits and compensation have changed

When does the new regime apply?

Potential headaches

Involving employees in developing procedures

Only "employees" are covered

Handling grievances during a disciplinary procedure

Do the parties have to try mediation?

The time limit for bringing claims is much shorter

There will be uncertainty over compensation

Practical steps

For employers

- Involve employees or their representatives in developing workplace procedures, and make sure those procedures are transparent and accessible to employees.
- Train managers how to handle grievances effectively, when to involve HR, and how to spot when there may be a potential legal claim.
- Encourage managers to resolve issues pro-actively and informally before they get to a formal grievance stage.
- Allow the employee to put their side of the story at a meeting before undertaking any necessary investigation and again before making any decision.
- Keep written records, including minutes of meetings.
- Communicate decisions effectively and promptly, setting out reasons.

For employees

- Seek to resolve matters informally but, if this is not possible, do not delay unreasonably before submitting a formal written grievance.
- Make every effort to attend meetings and consider bringing a companion.
- Submit a written appeal if not satisfied with the outcome and set out the reasons why not.

Be aware of the time limit for bringing a claim if the appeal is not successful or if the employer does not resolve it promptly.

SECTION FOUR

ANNUAL LEAVE

Governed partly by statute and partly by contract

Since 1 April 2009, under statute, all workers have the right to a minimum of 5.6 weeks' paid annual leave (equivalent to 28 days for a full-time employee) subject to certain exceptions.

Statutory annual leave

Working Time Regulations 1998 (WTR)

There is no legal connection between the new rights and public holidays.

WTR: Basic entitlement to annual leave

The basic right to annual leave under the WTR is as follows:

- A worker is entitled to 5.6 weeks' annual leave in each leave year. This is equivalent to 28 days for a five-day working week. However, workers cannot be entitled to more than 28 days' statutory leave.
- A part-time worker is entitled to 28 days holiday reduced pro rata according to the amount of days they work each week.
- No minimum period of continuous service is required to qualify for statutory annual leave. When the WTR was first enacted, workers needed 13 weeks' continuous service to qualify, but this was revoked by the Working Time (Amendment) Regulations 2001 with effect from 25 October 2001, after the ECJ ruled that it was contrary to the WTD (R (on the application of the Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry [2001]).
- A worker whose employment begins part way through a leave year (as defined in a relevant agreement) accrues their statutory holiday entitlement for that year on a pro-rata basis.

The increase in the statutory holiday entitlement under the WTR 2007 (the additional holiday) entitlement:

- May not be replaced by a payment in lieu, save on termination.
- May be carried forward into the next holiday year, if a relevant agreement provides that this will take place.
- Does not apply where workers were entitled to at least 5.6 weeks' holiday before 1 October 2007, provided the first 1.6 weeks' holiday:
 - Is in addition to the existing rights under the WTR.
 - Can only be replaced with a payment in lieu on termination.
 - Can only be carried forward into the next leave year.
 - Is paid at a week's pay for each week of holiday, calculated in accordance with the Employment Rights Act 1996 (ERA 1996), as amended by regulation 26A of the WTR.

The transitional period may present issues for employers when calculating workers' holiday entitlement in the relevant holiday years.

Bank holidays and public holidays

Under the Banking and Financial Dealings Act 1971 bank holidays in England and Wales are:

- Easter Monday.
- First Monday in May.
- Last Monday in May.
- Last Monday in August.
- Boxing Day (if not a Sunday).
- 1 January (or the next working day).

The term "public holidays" also includes the traditional holidays of Good Friday and Christmas Day, which are granted annually by Royal Proclamation. In Northern Ireland and Scotland, public holidays also include some additional locally declared holidays.

Public and bank holidays can cause particular problems when dealing with part-time workers.

Public holidays, statutory leave and contractual rights

Part-time workers

Statutory annual leave

Contractual annual leave

Part time workers and bank holidays

SECTION FIVE

FLEXIBLE WORKING

The right to request flexible working (Right to Request) was introduced under the Employment Act 2002 (EA 2002) and came into force on 6 April 2003.

At first, only carers of children under the age of six (or disabled children under the age of 18) qualified for the right to request flexible working.

On the 6th April 2009, the right to request flexible working extended to those responsible for children up to and including the age of 16.

The Right to Request itself is very limited in nature. It consists of:

- A right to request to work flexibly.
- A statutory request procedure.
- An obligation on the employer to consider that application properly.
- A limited number of grounds on which the employer can refuse the request.

The Right to Request Legislation does not create a **right** to work flexibly or part-time.

SECTION SIX

INCREASE IN REDUNDANCY PAYMENTS

One-off increase in a week's pay for the purposes of calculating the amount of a statutory redundancy payment, from £350 to £380.

This will result in a maximum potential statutory redundancy payment of £11,400.

SECTION SEVEN

HOLIDAY RIGHTS FOR THE LONG-TERM SICK

Stringer and others v HM Revenue and Customs

Schultz-Hoff v

Deutsche Rentenversicherung Bund

The right to annual leave during long-term sickness absence

The ECJ delivered a judgment that agreed with much of the Advocate General's opinions although it disagreed with her opinion on whether a worker could take annual leave during sick leave. It held that whether a worker is entitled to take annual leave during a period that would otherwise be sick leave is a matter for national law to determine. However, if a worker on sick leave is prevented from taking annual leave, national law must enable the worker to take their holiday at a later date, even after the end of the leave year. Furthermore, accrued annual leave must be paid in lieu on termination, regardless of whether the employee has been on sick leave for the whole or part of the leave year.

These points are discussed in more detail below.

Absent worker accrues annual leave

The ECJ held that, while member states can impose conditions on the exercise of the right to annual leave, there can be no conditions on the entitlement itself. Therefore a condition that the worker must actually have performed some work during the leave year in order to qualify for leave would be contrary to the EWTD. This also accords with article 5(4) of International Labour Organisation Convention 132, which provides that unavoidable absence from work, such as sick leave, "shall be counted as part of the period of service".

Member states may prevent worker taking annual leave during sick leave

The ECJ held that national law or practices which **preclude** the taking of annual leave during a period of sick leave are permitted by the EWTD, provided the worker does not lose the opportunity to take the annual leave altogether.

In principle, member states are able to impose conditions on the exercise of the right to annual leave under the EWTD, including a rule that workers must take any annual leave by the end of the leave year or lose it altogether. However, where a worker has been prevented from taking their leave (for example, by being on sick leave), the application of such a rule would be contrary to the Directive as it amounts not to a condition on the exercise of the right, but a denial of the right itself.

No objection in principle to taking annual leave during sick leave

The court also held that national law or practices which **permit** the taking of annual leave during a period which would otherwise be sick leave are also within the scope of the EWTD. Cases such as Merino Gómez [2004], in which the court had ruled that annual leave and maternity leave could not be taken concurrently, were distinguished on the basis that sick leave (unlike maternity leave) is not governed by Community law.

Payment in full on termination

The ECJ cited earlier case law in which it had held that the right to leave and the right to a payment in lieu as "two aspects of a single right". Since a worker who has been on sick leave for the whole or part of a leave year, and has been prevented from taking annual leave, does not lose the right to that leave, neither do they lose the right to a payment in lieu on termination.

The payment in lieu must be made at the rate of the worker's "normal remuneration", in order to put them in a comparable position, financially speaking, to the position they would have been in had they taken the leave during employment.

Impact on public sector

Impact on private sector

Impact on workers

SECTION EIGHT

THE EQUALITY BILL

The Equality Bill was introduced in the House of Commons on Friday 24 April 2009.

If enacted the bill will, among other things, consolidate the various pieces of legislation outlawing discrimination in employment and imposing equality duties on public authorities.

Some of the more significant changes to the law include new approaches to disability-related and indirect disability discrimination, extended coverage of third-party harassment and a new law prohibiting pay secrecy clauses in employment contracts.

The Government states that the bill has two main purposes – to harmonise discrimination law and to strengthen the law to support progress on equality.

The Government states that the bill is due to take effect in 2010.

However, please note that these provisions are as they stand in the bill as introduced and so are subject to change following debate.

Direct discrimination

Indirect discrimination

Harassment

Equal pay: the Equal Pay Act 1970

Hypothetical comparators

Gender pay gap

Disability discrimination

Reasonable adjustments

Equality duties

Enforcement