

General Advice: Employment law.

(Prepared February 2005)

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1. Contracts and Statements of Terms

A Contract of Employment may be an unwritten verbal agreement, a written document or a combination of the two. A written contract is preferable, but Parliament recognises that for many occupations it is impractical to have lengthy documents. As a compromise, the law requires an employer to supply to the employee within two months from the beginning of employment, a written Statement setting out the basic terms of employment. This Statement of Terms is not intended to be a hefty Contract, but should make it clear what the job is and what the rates of pay are etc. Many employers already include the majority of this information in a letter that is sent to new employees to sign and return to make sure that the terms are agreed.

The Statement of the Terms of Employment should state what the employer's position is on the following matters: - job title, pay, hours of work, holidays, sickness absence, pension, notice periods, collective agreements and any grievance and disciplinary rule and procedure. In the absence of a written Contract of Employment or Statement of Terms of Employment from the employer, a Court or Tribunal can be left with the difficult task of deciding what the terms are.

2. Deductions from Wages

With few exceptions an employer may not make unauthorised deductions from pay that is due to the employee for work done. Deductions are permitted by statute such as the deduction of income tax. Otherwise the employer should get prior written permission from the employee (at the beginning of employment) that deductions

can be made. For example, the cost of breakages cannot automatically be deducted without prior authority. If pay is unlawfully withheld the employee may complain to an Employment Tribunal within three months or issue proceedings in the Courts within six years.

3. Statutory Time Limits, Notice and Reasons

An employee who has been continuously employed for one year with the same employer is entitled to ask for written reasons for his dismissal. There is an obligation on employers to give written reasons of dismissal within fourteen days of receiving such a request, failing which the employee may apply to an Employment Tribunal. In many cases the employee will have been dismissed in writing by a letter setting out the reasons for dismissal.

Dismissal from employment without notice is only capable of being justified in the most extreme cases where there has been gross misconduct, such as an incident of theft from the employer. Otherwise, after an employee has been in work for one month or more, he becomes entitled to one week's notice. After two years of continuous employment the employee becomes entitled to one week's notice for every completed year of employment up to a maximum notice period of twelve weeks. It is possible for a Contract between the employer and the employee to require longer periods of notice, but the employee does not have to accept shorter notice than the statutory minimum.

Employees do not have an indefinite amount of time in which to make a complaint to an Employment Tribunal. For the most common claims of dismissal employees are only entitled to make a complaint if the Tribunal have received the appropriate application form within three months of the date of the dismissal. Application forms are generally available from Job Centres and online at www.employmenttribunals.gov.uk where online claims can now be issued in most cases. Outside of the three month time limit it is rare that an employee can persuade the Tribunal to grant more time.

If an employee tries to begin an Employment Tribunal case without finishing a Statutory Dismissal and Discipline Procedure, or a Grievance Procedure time can be extended for up to three months but the rules and their exceptions are complicated and likely to lead to mistakes if relied upon in the wrong circumstances.

4. Standard Discipline and Dismissal Procedure

Employers and employees are obliged to follow Statutory Dismissal Procedures from October 2004. With some exceptions the SDDP applies wherever the employer is contemplating dismissing or taking relevant disciplinary action.

Step 1: Statement of grounds for action and invitation to meeting.

- The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which led the employer to contemplate dismissing or taking disciplinary action against the employee.
- The employer must send the Statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: Meeting

- The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.
- The meeting must not take place unless:
 - (a) the employer has informed the employee what the basis was for including in the Statement under Step 1, the ground or grounds given in it, and
 - (b) the employee has had a reasonable opportunity to consider his or her response to that information.
- The employee must take all reasonable steps to attend the meeting.
- After the meeting, the employer must inform the employee of his decision and notify him or her of the right to appeal against the decision if he or she is not satisfied with it.

Step 3: Appeal

- If the employee does wish to appeal, he or she must inform the employer.
- If the employee informs the employer of his or her wish to appeal, the employer must invite the employee to attend a further meeting.
- The employee must take all reasonable steps to attend the meeting.
- The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

5. Standard Grievance Procedure

From October 2004 statutory requirements for Grievance Procedures apply. With some exceptions the SGP applies where the employee's complaint is of a type that might lead to a claim to an Employment Tribunal.

Step 1: Statement and Grievance

- The employee must set out the grievance in writing and send the Statement or a copy of it to the employer

Step 2: Meeting

- The employer must invite the employee to attend a meeting to discuss the grievance.
- The meeting must not take place unless:
 - (a) the employee has informed the employer what the basis for the grievance was when he or she made the Statement under Step 1 above, and
 - (b) the employer has had a reasonable opportunity to consider his response to that information.
- The employee must take all reasonable steps to attend the meeting.
- After the meeting the employer must inform the employee of his decision as to the grievance and notify the employee of the right to appeal against that decision if the employee is not satisfied with it.

Step 3: Appeal

- If the employee does wish to appeal, he or she must inform the employer.
- If the employee informs the employer of his or her wish to appeal, the employer must invite the employee to attend a further meeting.
- The employee must take all reasonable steps to attend the meeting.
- After the appeal meeting the employer must inform the employee of his final decision.

6. European Re-Interpretation

Employment law is a political battleground between the European Union and the British Government. The present government intends to change the law, because English law is, in various respects, out of line with Europe. Wherever there are limitations on rights, our system is vulnerable to allegations of unlawful discrimination. Our Courts and Tribunals will continue to follow English law, but employers and employees must be aware that cases currently awaiting decision in Europe could prevail, usually to the advantage of employees.

7. Redundancy Formula

The term redundancy has a precise meaning in English law. Work done by the employee may be expected to cease or diminish. In general the employer must be able to say that there is no longer enough work for the employee in question. If the employee has completed two or more continuous years of full time employment he or she will be entitled to a redundancy payment. The formula for calculating a redundancy payment depends on the age of the employee, the total number of completed years of employment and the value of one week's pay. The maximum number of years of service that can be taken into account is twenty years. The maximum amount of one week's pay that can be taken into account is £280.00. Depending on the age of the employee this is then multiplied: by one half for employment up to twenty-two years of age; by one for employment between twenty-two years of age and forty-one years of age; and one and a half for employment between forty-one years of age and sixty-five years of age. Consequently, the maximum statutory redundancy payment is as follows:

$$£280.00 \times 20 \text{ weeks} \times 1.5 = £8,400.00$$

8. Unfair Dismissal Claim

Every employee who has been continuously in the same full time employment for one complete year or more has the right not to be unfairly dismissed from employment. The responsibility is on the employer to justify the fairness of any dismissal. A dismissal must be fair, not only as to the reason for ending employment, but the manner in which the dismissal is carried out. Consequently, most employers feel it necessary to give employees a series of warnings and an opportunity to justify themselves before they take the drastic step of dismissal. Dismissal will usually be with notice or pay in lieu of notice. Only in exceptional circumstances of gross misconduct, will an immediate dismissal without notice be justified.

A complaint of unfair dismissal must be made to an Employment Tribunal within three months of the dismissal. The employee's claim can be for re-instatement, but will usually be for money. The Tribunal have the power to award a sum of money calculated in the same way as a statutory redundancy payment and this is known as the "basic award". In addition, the Tribunal can order a second sum of money to be paid as a "compensatory award" to cover other financial losses such as loss of earnings during unemployment. The employee must try to keep such losses to a minimum by trying to obtain alternative work. The maximum basic award is the same figure as the maximum for statutory redundancy. The maximum compensatory award is £56,800.00 as from 1st February 2005.

9. Wrongful Dismissal

In some cases the employee may have a claim for wrongful dismissal in the County or High Court. Claims for redundancy and unfair dismissal are almost entirely dealt with by the Employment Tribunal. Unlike a claim for unfair dismissal, there is no minimum period of employment before there is a right to make a claim for wrongful dismissal. There remain some occasions when a civil claim in the Courts for wrongful dismissal will still be the preferred option for an employee who has been dismissed. Typically, this occurs when an employee who has a Contract of Employment for a fixed number of years is dismissed prematurely. In such cases the employee will usually sue for compensation amounting to the full pay due to him for the unexpired portion of the Contract. The employee must usually make reasonable efforts to obtain alternative employment to minimize (or mitigate) the financial loss, although the Courts have declared that a claim will not altogether fail, purely because an employee has not tried to find employment.

10. Constructive Dismissal

If an employer fundamentally changes the employee's job without agreement this can amount to a constructive dismissal. Although the employee may not have been officially sacked the changes to the job may amount to the original job being taken away. It is as if the employer has fundamentally broken the contract of employment. An employee who can prove constructive dismissal may be able to claim redundancy, unfair or wrongful dismissal. We receive a great many enquiries from employees who have had a brush with their employer and are feeling disillusioned with changes that have been imposed upon them. It can be very upsetting for employees to lose status, benefits

or a familiar post that they have been working in. If the employee refuses to work under the new terms and conditions, they may be able to claim constructive dismissal. It is a hard choice for the employee, because they cannot be one hundred per cent sure that the Tribunal will look upon their circumstances as amounting to constructive dismissal. Walking out on the job could simply be seen as voluntary resignation, with no compensation payable. Before taking such a step the employee is recommended to consider what they would be entitled to if successful in proving a constructive dismissal.

For example, a person with less than one year's service does not enjoy automatic protection against unfair dismissal and does not become entitled to a Statutory Redundancy Payment. Such an employee is typically entitled to one week's notice, or pay in lieu of notice. An employee with a mortgage to pay and a family to keep might choose not to leave the job on the strength of constructive dismissal simply to claim one week's pay in lieu of notice. By contrast, an employee who faces a fifty per cent pay cut may rightly feel that the employer has torn up their old terms of employment and that there is no question of continuing with the old job, in any circumstances. In general, the harder it is for the employee to decide what to do, the harder it is for the Tribunal to decide whether there has been a constructive dismissal. Strong cases tend to speak for themselves.

Statutory grievance procedures mean that it may prove impossible to make a claim of constructive dismissal unless the employee has first followed the SGP (Statutory Grievance Procedure) .

11. Voluntary Resignation

If an employee chooses to leave a job voluntarily and freely they cannot claim to have been dismissed. Consequently, they have no claim for redundancy or dismissal.

12. Restraints of Trade

As a matter of public policy restrictive covenants can only be enforced if they are reasonable restraints on the activities of the employee concerned. Reasonable means that the restraint is no wider than is necessary to protect the employer's legitimate business interests. A restrictive covenant will not be enforced unless its terms are sufficiently clear. There have been instances where Courts have been prepared to imply a duty on a former employee not to reveal a trade secret once his employment has ended, but a high degree of confidentiality is necessary to constitute a trade secret. In the absence of an express covenant restricting the use of such

information, an employer cannot expect to be granted an Injunction to prevent the employee from using the knowledge he has acquired. When considering any restraint of trade clause in an Employment Contract, a Court may conclude that it is drafted too widely and reduce it to something that it regards as more reasonable. If the only purpose of a covenant is to stop an employee from competing with a former employer it is unlikely to be upheld. To enforce a covenant, an employer must show some interest that can legitimately be protected by enforcing the restrictive covenant. Protection cannot legitimately be claimed in respect of the skill, experience, know how and general knowledge of an employee (even if gained during employment). It is possible to protect trade secrets if it can be shown that they are the employer's property, that the employer has carefully restricted publication of the information and that misuse of the information be capable of harming the employer. Restrictions on soliciting customers or poaching former employees of a business will only be enforceable if they are strictly necessary. A clause that is intended to apply to an unreasonably large geographical area, or an unreasonable length of time, may be unenforceable. Every case must be judged on its own facts and there can be no advice that will cover every set of circumstances.

13. Order for Costs

It is unusual for the Employment Tribunal to make any award for legal costs (although it does have the power to award costs for or against any party if it believes that the bringing or conducting of the proceedings was misconceived). In most Tribunal proceedings the parties must bear the costs of their own representation. Depending upon the circumstances of the case, the costs can be an important factor when deciding the extent to which it is profitable for the client to use a Solicitor.

Other detailed rules about costs apply to other Court proceedings. Those rules are outlined elsewhere in the annex to a document entitled "Client Care Information" that we usually provide to our clients at the outset of our advice.

The information in this guidance note is necessarily general in its terms.

The principles and laws concerned may change, and the application will vary according to the particular circumstances of your case.

Please do not be afraid to ask for more information.