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Advanced Application of Employment Law 2022/2023

with Capital Law Ltd



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Employment law

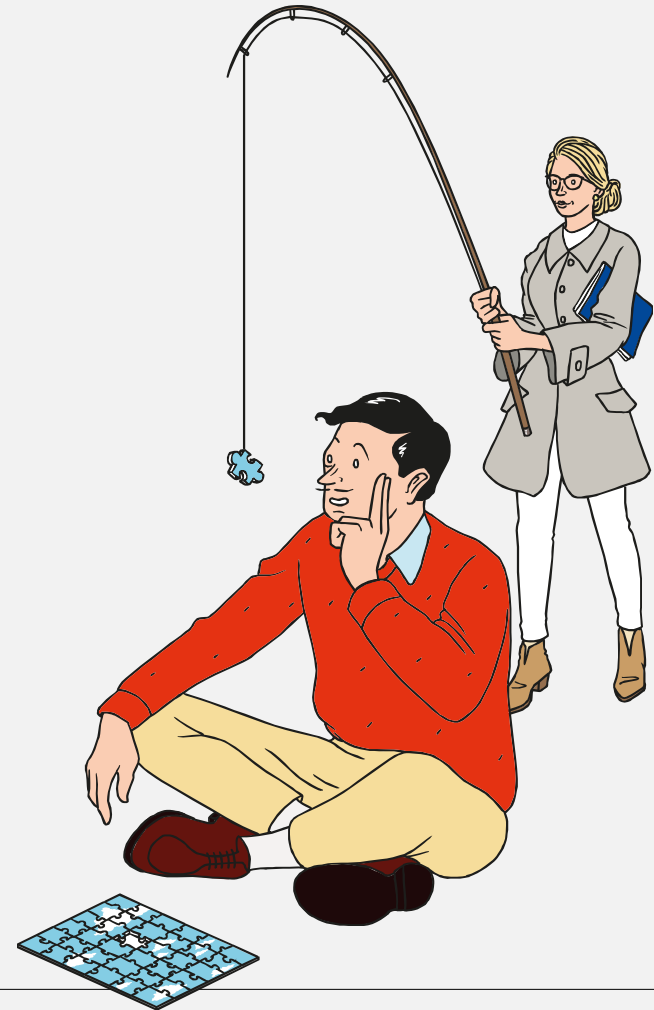
Topic 1. Contracts of employment and service agreements

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Employment and Immigration



Agenda

- 01 Formation of a contract
- 02 Form of a contract
- 03 Contractual terms
- 04 Variation of contracts
- 05 Employer protection
- 06 Breach of contract and remedies
- 07 Termination of contracts
- 08 Service agreements

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Formation and form of a contract



01 Formation

The 5 “Cs” of contract law:

- **Communicate** offer
- **Confirm** acceptance
- **Consideration**
- **Certainty**
- **Create** legal relations

Judge v Crown Leisure Ltd [2005] IRLR 823

Contract **exists** once the offer of employer is accepted, and all conditions are fulfilled.

2.1 Form

Contract can be:

- written
- oral
- mixture of both
- *Cheltenham BC v Laird* [2009] IRLR 621

Best practice = **in writing**.

Section 1 of the Employment Rights Act 1996

Signed v unsigned contracts

2.2

Form – section 1 ERA 1996

Terms that must be in one document

- names of employee and employer
- date employment begins / began
- job title or description
- if fixed term, the end date
- probationary terms
- place of work and details where employee is required to work overseas for 1+ months
- salary and when it is paid
- hours of work including days, or details if variable
- holiday entitlement and pay
- training the employee is required to complete
- benefits
- notice by either party to terminate

2.2

Form – section 1 ERA 1996

Terms that can be in another document

- sick leave and sick pay
- other paid leave (not sick leave or holiday)
- pensions
- training by the employer

Terms that can be given within 2 months

- collective agreement terms
- disciplinary & grievance information

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Contractual terms



3.1 Identifying terms — express

Express

- written employment contract
- Staff Handbook and/ or policies?

Collective agreements

Parties free to agree any terms but certain terms are **not enforceable**:

- terms requiring parties to act unlawfully
- terms depriving employees of statutory rights
- discriminatory terms
- terms ‘in restraint of trade’

3.2 Implied

How are terms implied?

- Characteristic terms
- Terms implied by law
- Terms implied by fact
- Terms implied by custom and practice.

3.3 Implied

Common implied terms for **employees** include:

- a duty to provide faithful service
- a duty of fidelity and obedience
- a duty to be adaptable
- a duty to work with due diligence and care
- a duty to take reasonable care of company property
- a duty not to disclosing trade secrets and/or confidential information.

3.4 Implied

Common implied terms for **employer** include:

- care for employee's health & safety
- provide support to managers and supervisors
- provide a suitable working environment
- provide redress for grievances
- pay for and provide work (in most cases).

3.5 Implied

Common implied terms for **both parties**:

- not to destroy relationship of trust and confidence between employer and employee (without good cause)
- give a reasonable period of notice of termination where no specific notice has been agreed.

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Variation of contracts



4.1 Variation

Contractual right to vary?

Example 1:

Your role will be Senior Manager or such other role as we consider appropriate.

Example 2:

Your normal place of work is the company's head office at 123 City Street, Cardiff or such other place as we may reasonably require for the proper performance and exercise of your duties.

4.2 Variation

Variation by agreement

- agreement may be in writing, oral or implied by conduct of parties. **In writing is better!**
- agreement must be voluntary, no duress
- there must be consideration
- implied agreement to the change – caution in relying on this

4.3 Variation

Unilateral variation

Technically a breach of contract and the employee can respond in a number of ways:

- accept the breach—carry on under new terms
- refuse to accept the change
- work under protest and ‘stand and sue’
- if the change is fundamental, resign and claim constructive unfair dismissal
- if change is substantial, treat themselves as dismissed

4.4 Variation

Dismissal and re-engagement

- Still a dismissal, usual process and risks apply (but are mitigated)
- If it involves changes to 20+ employees, this will trigger the duty to collectively consult
- Must give notice (or risk wrongful dismissal claims)
- Discrimination?

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Employer protection and remedies for breach



05 Employer protection in contracts

- Protection of confidential information during and after employment
- Intellectual property
- Restrictive covenants

06 Breach of contract and remedies

- Remedies** for the employer for breach of contract
- undertakings
 - damages
 - account of profits
 - injunction

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Termination of contracts



07 Termination

The different ways a contract can be **terminated** include:

- dismissal
- resignation / constructive dismissal
- non-renewal of fixed term contract
- agreement
- frustration
- illegality

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Service agreements



08

Service agreements

Typical additional clauses in a service agreement include:

- employee warranties
- duties
- reference to directors and officers insurance
- clauses on what happens when the employee ceases to be a director
- specific clauses on how the agreement can be terminated
- obligations on the individual on termination

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Employment law

Topic 2. Employment status

Agenda

- 01 Types of status
- 02 Employees
- 03 Workers
- 04 Self-employed
- 05 Atypical arrangements
- 06 Employee and worker rights
- 07 Taylor review and future developments

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Types of status

01

Types of status

Employee

Worker

Self-employed

02 Employees

Section 230 Employment Rights Act 1996

Autoclenz Ltd v Belcher and others [2011] IRLR 820 (SC)
Uber BV v Aslam [2018] EWCA Civ 2748

To be an employee:

- mutuality of obligation
- control
- personal service

***Ready Mixed Concrete (South East) Ltd v the
Minister of Pensions and National Insurance***
[1968] 2 QB 497

02 Employees

Plus other factors “pointing” to or away from employment...

Integration into business

Other activities

Description used by the parties

Nature and length of engagement

Benefits and insurance

Is the person performing the services in business of their own account?

Stringfellows Restaurants Ltd v Quashie [2012]
EWCA Civ 1735

03 Workers

“Workers”

- category invented by legislation (s230(3))
- more rights than independent contractors
- fewer rights than employees
- personal service / not exercising business or profession
- similar tests to employment but lower ‘pass mark’.

04 Self-employed

People genuinely in business on their own account:

- bear their own financial risk
- are not paid through PAYE – invoice
- have an unfettered right to substitute
- are in control of when they work and how
- provide their own equipment
- are free to turn down or accept work
- are not subject to any control – independent.

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Atypical workers

5.1 “Atypical” workers

What does this mean?

- Anything that is not typical i.e. not an open-ended contract to work for one employer on a full-time basis. Could include
 - Agency workers
 - Annualised hours/term time only
 - Apprentices
 - Casual (including zero hours)
 - Fixed term
 - Secondments/placements
 - Volunteers

Why is it important?

- What rights/protections does the individual have?

5.2 “Atypical” workers

Discussion point:

Is it actually now “typical” to be “atypical”?

What impact has Covid-19 and the pandemic had on the concept of ‘typical’ working?

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Employee and worker rights

6.1 Employee rights

All **employment** rights, i.e.,

- right not to be unfairly dismissed
- right to SSP, SMP, SPP, SAP (where eligible)
- right to family leave (where eligible)
- right to request flexible working
- TUPE protection
- fixed term worker protection
- statutory minimum notice period
- redundancy payment
- + all worker rights

6.2 Worker rights

Workers benefit from the following:

- National Minimum Wage
- paid annual leave (**King v The Sash Window Workshop Ltd and another C-214/16, Harpur Trust v Brazel**)
- rest breaks
- maximum working week
- right to be accompanied at certain meetings
- whistleblower protection
- discrimination protection
- part-time worker protection

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Thank you.
Any questions?