

Chapter 2: The Employment Contract and its Clauses

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Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the CILEx syllabus:

- 1 Understand the law on restraint clauses arising from express and implied terms of the employment contract.

2.1 Introduction

Employment law is based on the law of contract and almost all working relationships are governed by contracts. A major difference between employment law and the law of contract generally is that the law of contract is based largely on common law principles, while many areas of employment law are based on legislation. This is because the law of contract presumes that the parties have equal bargaining power – a person is free to agree to do or buy anything on whatever terms he likes. By contrast, the relationship between worker and employer is usually very unequal. Most of us do not even try to negotiate more favourable terms and conditions when we are offered a new job. The employer has far more bargaining power and many are simply content to have been successful in securing employment in the first place. Much of statutory employment law was created in an attempt to compensate for this imbalance of power.

Common law principles are not, however, irrelevant to employment law. For example, the employment contract conforms to the general rule that it does not need to be in writing to be valid; contracts of employment can therefore be made orally, by conduct or in writing. In addition, the common law allows certain terms to be implied into employment contracts in order to make them workable.

This chapter introduces the most important elements of employment contracts and the key clauses contained within them. It will discuss:

- the nature and content of the written statement of particular terms;
- typical additional express employment contract clauses;
- terms implied into contracts of employment; and
- the main post-termination restraints.

2.2 s1 statements: the written statement of particular terms

There is no general requirement for a contract of employment to be in writing. The main exception is contracts of merchant seamen, who must have individual written agreements. A contract of employment is formed when the offer of a job is accepted by the new employee. In reality, there may be little more than a brief oral agreement, with little mention of the full detailed terms other than, possibly, pay, working hours and the start date. The new employee will just turn up when agreed and begin their job. Nevertheless, to avoid a dispute, it is useful for the employer and new employee to record the terms in writing and many employers who seek legal advice will provide written contracts of employment to their staff. Despite the lack of any formal requirements to create the contract of employment, the **Employment Rights Act 1996 (ERA 1996)** requires employers to provide their employees with written details of many of the crucial terms of their contract. These protections were first introduced by the **Contracts of Employment Act 1963** and, following a number of updates over the years, the law was consolidated in 1996. The relevant section can now be found in **s1 ERA 1996** so the term “s1 statement” is commonly used and remains accurate.

To ensure that new employees receive details of the essential terms of their employment, **s1 ERA 1996** requires employers to provide employees whose employment is to continue for more than one month with a written statement of particular terms of their contract. This written statement must be given to employees no later than two months after their employment begins. The written statement may be given in instalments during the two-month period, but the most important terms must be given in a single document. In **(1) Stefanko (2) Woronowicz & (3) Jonik v Maritime Hotel Ltd (in voluntary liquidation) & (2) Doherty [2018]** the EAT held that the right to a written statement exists in law even if the employee's employment is terminated just before the two months are up. The **Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018** will come into force on 6 April 2020. It provides that the written statement of employment particulars must be given from day one of employment. There are also plans to extend this right to workers.

The statement must contain the following details:

- the names of the employer and employee;
- the date when employment began;
- the date when continuous employment began (sometimes, previous employment can be included in the calculation of employment for continuity purposes);
- rate, method and frequency of pay;
- hours of work;
- holiday entitlement and details of accrued holiday pay;
- job title or brief job description;

- place of work;
- if the employment is temporary, how long it is expected to continue;
- collective agreements that directly affect terms and conditions; and
- for employees who are sent to work outside the UK for more than a month, details of the period of such work, the currency in which they will be paid, special benefits to be given while they work abroad and terms relating to their return to the UK.

Some terms do not need to be included in this single document and may refer the employee to another document that the employee has a reasonable opportunity to read in the course of their employment or that is made readily accessible to the employee in some other way. The written statement must refer to these other sources in respect of:

- sickness, injury and sick pay;
- pensions and pension schemes;
- notice periods; and
- disciplinary and grievance procedures.

If there is any change to any of the particular terms within the written statement, either individually negotiated or through collective bargaining, **s4 ERA 1996** states that the employer must give the employee a written statement containing details of the change at the earliest opportunity and, in any event, no later than one month after the change. This obligation to **notify** changes individually does not give the employer a unilateral right to make changes – this would be a breach of contract by the employer. It only places employers under an obligation to notify their employees of any **agreed** changes.

2.2.1 The contract of employment

The contract of employment consists of both express and implied terms. The express terms are those which have been agreed between the employer and employee. Many of these terms will be included in the written statement of initial employment particulars, but there will be additional terms that are specific to the employee's situation (e.g. a clause relating to the provision of a company car). We will look at specific implied terms later in this section.

In addition, there are a number of terms that come from sources that are incorporated into the contract of employment:

- custom and practice – something that has occurred regularly can become a contractual term. For example, providing a Christmas bonus for several years could make entitlement to that bonus contractual;
- statute – the contract cannot offer terms that are less than those set out in statute (e.g. the employer cannot offer payment terms that are less than those set out in the **National Minimum Wage Act 1998**);
- collective agreements – if there is a recognised trade union any collective agreements are likely to be implied terms of the contract of employment;

- case law – rulings from case law are applied to the employment of all employees, because they determine how courts will determine points of law;
- staff handbooks – the rules set out in a company handbook may be implied into the contract of employment.

If a contract is in writing, there is no requirement for it to be signed, although it is certainly good practice to ensure that both parties do sign it. In ***F W Farnsworth Ltd v Lacy [2012]*** the employee argued that he had not signed the contract issued to him on his promotion, hence the restrictive covenant contained in the contract did not apply. He was unsuccessful in arguing this because he had been working in accordance with the contract and, in particular, had taken up pension and healthcare benefits contained in the contract issued on his promotion.

2.3 Express contractual clauses

Although the essential terms such as pay, working hours and holiday may be sufficient in some cases, many employers are likely to require additional clauses to be included in the contract of employment. Employees who want these additional express clauses will need to have a written contract of employment rather than just relying on a **s1** statement. The nature of these additional clauses will depend on the situation and type of employment. There are some common types of clause that can be found in many standard employment contracts. These include terms relating to:

- probationary period;
- payment in lieu of notice;
- confidentiality;
- garden leave; and
- gross misconduct.

As well as these common types of clause, there may be other express terms contained in other documents which are incorporated into the contract. Examples might be equal opportunities policies or policies regulating the use of internet and email technology in the workplace. These are **not** always terms of the contract and whether they are incorporated into the contract is discussed in more detail in **Chapter 3**.

2.3.1 Probationary period clauses

A probationary period is a trial period at the start of employment during which the employee is assessed by the employer and following which they are notified as to whether the appointment will be made permanent.

The scope and terms of any probationary period will vary. It will typically last three or six months and may involve either formal or informal assessments. During this period, it is normal for the employee not to be entitled to all the contractual benefits, such as membership of the pension scheme or health care. An employee's statutory rights are not affected.

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