Think Ahead ACCA

Technical factsheet

The contract of employment

This factsheet is part of a suite of employment factsheets and a pro forma contract and statement of terms and conditions that are updated regularly. These are:

The contract of employment
The standard statement of terms and conditions
Working time
Age discrimination
Dealing with sickness
Managing performance
Disciplinary, dismissal and grievance procedures
Unlawful discrimination
Redundancy
Settlement offers
Family-friendly rights
Employment status: workers

Every relationship between an employer and an employee is governed by a contract of employment, which is an agreement setting out their mutual obligations. This contract may be in writing or it may be oral. Where parties are clearly in a relationship of employment, the contract will start on the first day of work. If there are no written terms, the parties' obligations are implied by looking at how they conduct their relationship on a day-to-day basis. So, although there is no need for an employment contract to be set out in writing in order to be legally valid, it is both highly advisable and technically a regulatory requirement to do so. The one exception to this is an apprenticeship contract,

which must be set out in writing in order to be valid. (This is as laid out in S32 of the Apprenticeship, Skills, Children and Learning Act 2009.)

To find out more about ACCA's apprenticeship programme, read *Technical factsheet: Apprenticeships in the finance function* and visit the Apprenticeships in England page.

Why should I use a written contract or statement?

As well as being a legal requirement, employers should bear in mind that writing down the basis of your agreement is likely to avoid disagreements later on. It is also a good discipline as it makes the employer think about, and decide, what the terms of the arrangement are going to be. It is therefore highly recommended.

What are the minimum requirements?

For contracts of employment that started before 6 April 2020, the relevant law is contained in s1 of the Employment Rights Act 1996. This required employers to provide employees with a written statement of the main terms of the employment within two calendar months of starting work.

The mandatory terms that had to be covered in this statement were:

- the names of the parties
- the date that employment started
- if the employee was already employed, and the contract related to a new position, on what date continuous employment with the employer started
- a job title and/or brief description of the role
- hours of work
- scale or rate of remuneration
- intervals of payment
- hours
- overtime
- holidays
- sick pay
- grievance procedure*
- disciplinary procedure*

- pension*
- place of work
- notice of termination that the employer was required to give the employee
- whether or not any collective agreement applied to the contract.

* These did not need to be laid out in full in the statement but could be in a separate document to which the statement refers.

Right to a statement

The right to a statement of written particulars is a day-one right and there is no qualifying period of service required for it to apply. In order to improve the lot of casual workers in particular, legislation extended the entitlement to a statement of 'written particulars' beyond just employees to include them.

The information to be included in the written statement for employees and workers from day one has also been expanded. In addition to the current information listed above, for all new joiners on or after 6 April 2020 the statement should also include:

- how long a job is expected to last, or the end date of a fixed-term contract
- how much notice the worker is required to give to terminate the agreement
- details of eligibility for sick leave and pay
- details of other types of paid leave, eg maternity and paternity leave
- the duration and conditions of any probationary period
- all remuneration (not just pay), eg vouchers, lunch and health insurance
- the normal working hours; the days of the week the worker is required to work; and whether such hours or days may be variable, and, if so, how they vary or how that variation is to be determined
- any training entitlement provided by the employer; any part of that training that the employer requires the worker to complete; and any other training that the employer requires the worker to complete and for which the employer will not bear the cost.

Employers will need to draft new statements and contracts in order to ensure that this information is provided, and look at induction procedures to make sure the correct documentation is delivered to all employees and workers on or before their first day of work.

Where the employer gives the employee a contract of employment covering all these matters, it does not also have to provide a statement. To assist employers, ACCA has produced a pro forma contract of employment and a separate statement of terms and conditions.

In addition to the contract of employment, ACCA has produced an accompanying computer use policy. This can be added as an appendix to the contract of employment at your discretion, or included in your handbook.

How do new rights apply to existing employees or workers?

These changes do not apply retrospectively to employees or workers who were working for the employer before 6 April 2020 (when the change was introduced), but they are now able to request a written statement including the additional information, and employers are required to comply with such requests within one month.

What happens if I do not provide a statement or a contract?

There is no freestanding right for an employee or worker to make a claim if the employer fails to provide either a compliant contract or a statement. However, if they were to take an employment tribunal case relating to another aspect of their employment and were successful, and the employer had not provided at least a statement containing the appropriate information, an additional award of between two and four weeks' pay may be made against the employer. This applies whichever set of rules apply to the contract.

What is the difference between a contract and a statement?

There is a legal difference between a contract and a statement. Where an employee signs an employment contract to say that they agree with the terms, it is binding on both parties from the date of the contract and it does not matter whether the employee/worker has read or understood the terms or not. On the other hand, a standard statement is simply 'issued' to the employee/worker and represents the employer's version of the terms. It may not be signed and, even if it is, the signature does not indicate agreement to the terms – just a confirmation that it has been received.

However, there will be a point at which the employee is taken to have accepted the terms of a statement; if they have acted in accordance with a particular requirement in their day-to-day working life, it is presumed that they have agreed to it. For example, if they habitually work the hours and perform the role as described in the statement, it is clear that these terms are agreed. In respect of any other terms, the statement along with the parties' conduct is of evidential value in proving that this term is part of the contract of employment.

Which should I use?

It is better to have a statement than nothing at all, but it is generally preferable for the employer to provide a contract, as all the terms are then clearly binding on the employee from the date of the signature. In addition, the employer can also include a wide range of other clauses in a more comprehensive contract, such as provisions about confidentiality. For further information about this, please see the pro forma contract of employment or statement of terms.

What if the parties do not agree about the terms of their contract or statement?

If there has been some confusion or misunderstanding about what the parties have agreed, what happens will depend on the status of the worker and how long they have been employed, as well as the impact of the disagreement. Any worker or employee might have a claim of unlawful discrimination because of the way they are being treated by the employer if they consider that the reason for it is their protected characteristic, in which case that will be the cause of action to pursue. If the employer has not paid something that had been promised, eg proper notice, full wages or overtime, then both workers and employees may have a claim for damages for breach of contract. Employees who have been dismissed because of the disagreement will have a remedy where the circumstances bring them within one of the automatic unfair dismissal grounds set out by Acas.

Other than in those circumstances, casuals or agency workers as well as employees who have been continuously employed for less than two years have little option but to live with it or leave and seek work elsewhere.

Once an employee has worked past that statutory period of two years, they may be able to claim unfair dismissal if the employer is requiring them to do something that they

consider is beyond their contractual obligations. In theory, the employer's demand could permit the employee to leave and claim constructive dismissal; this is not a decision to be taken lightly and it would be rare to advise any employee to do this. The law has always required a degree of flexibility from employees, particularly in small businesses, so a tribunal would have to be convinced that what was being expected went well beyond what the employee should have been asked to do. This might be because it looks to be completely outside their remit and/or they have insufficient training, or the demand is altogether unreasonable. In addition, what has been agreed between the parties will often be a matter of oral evidence and it is notoriously difficult to rely on this; the evidence is usually a matter of one word against another.

There is a right under S121 of the Employment Rights Act for either party to apply to the tribunal to ask them to determine the accuracy of a standard statement of terms and conditions, and to ask for the particulars to be confirmed, amended or substituted with fresh ones. This tends to happen when there are other claims in respect of other employment matters and the argument is that the particulars are inaccurate. This power covers a situation where the particulars are incorrect rather than incomplete, and the tribunal will not use it to interpret the meaning of a term that the parties disagree on.

As ever, the best option is for both parties to negotiate and try to reach some kind of sensible compromise**.**

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