INTRODUCTION TO EMPLOYMENT LAW

THE EMPLOYMENT CONTRACT

GENERAL PRINCIPLES

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1 Introduction

Underlying every employment relationship is a contract between employer and employee. Superimposed on this basic contractual relationship we have developed statutory and common law provisions derived from European and domestic sources. Many of these developments have been driven by the political, social and economic environment over time. From the earliest case law of "master and servant" the law has sought to interpret and regulate this relationship, often with a view to rebalancing the perceived inequality of bargaining power between an employer and an employee. In some jurisdictions this perceived imbalance has led to a highly prescriptive approach, where the content of the contract is itself codified and collective bargaining machinery is imposed. In the UK, we have chosen to tread a less straightforward path, creating statutory protections, providing interpretive frameworks through case law and recognising a role for collective rights. But at its heart, the employment relationship relies on a contract between employer and employee and uses tests common throughout contract law to establish the formation and content of that contract.

This paper is designed to provide a basic outline of this aspect of employment law. We shall begin by looking at how the contract is formed and how the content of the contract may be ascertained. We will consider both express terms and the vitally important and dynamic area of implied terms in the employment contract. We will also consider the remedies which may be available if either party breaches the contract. This paper is in no way intended to be an exhaustive treatment of the subject, or a substitute for proper and detailed research. It is a starting point only, intended to draw attention to aspects of the employment contract which are significant and require particular attention from practitioners.

In addition to these contractual points, it will also often be necessary to consider the nature of the contract formed. This paper does not consider the issue of employment status and you are referred to the separate paper on that topic for a detailed consideration of employment status and the statutory rights which may apply to those providing services in different capacities.

2 Formation of the Contract

A contract is a set of legally enforceable promises. The law on formation of contracts applies to employment contracts as to any other. Given how highly developed the principles of contract formation are, it is surprising that new employment cases on these principles are still arising. Perhaps this is a consequence of the fact that employment contracts are simply so common and are often created or added to in a relatively informal fashion. Reminding ourselves of these key principles is therefore key to ensuring that our clients create contractual rights only when they intend to. The necessary elements of a legally enforceable contract are:

(a) An offer

(b) An acceptance

(c) An intention to create legal relations

(d) Proper or valuable consideration

(e) Reasonable certainty as to terms.

2.1 The Offer

An offer is an indication of willingness to be bound by a contract. It must be sufficiently clear and unequivocal to be capable of immediate acceptance and it must be communicated to the person to whom it is made. An offer can be conditional. In fact, most employment contracts will include conditions, for example regarding satisfactory references or proof of the right to work in the UK. Such conditions precedent mean that a binding contract will only arise once the conditions have been satisfied or waived. If a condition is expressed as a condition subsequent then the binding contract will be formed before the condition is satisfied but may later be terminated if the condition is not met.

An offer may also be time limited, in which case if it has not been accepted within the stated time, or prior to the stated event, then it will lapse. The offer may also be revoked at any time prior to acceptance, but it should be noted that revocation will only be effective when the revocation notice is received by the employee. However, if acceptance is by post, it will be effective when it is sent.

2.2 Acceptance

Unless the offer expresses a mode of acceptance, an employee may accept expressly (whether orally or in writing) or impliedly by a course of conduct. Simply turning up for work would normally constitute acceptance. Once acceptance has been given unconditionally the contract will be binding and cannot be withdrawn unilaterally. The contract can, of course, still be terminated in accordance with its terms.

If the acceptance is itself subject to conditions or includes new terms then it does not constitute acceptance, but rather it is a counter-offer. It should be noted that an exception to this rule exists in relation to trial periods following a redundancy situation, where both at statute and common law the contract will be treated as conditional upon the employee's right to "try-out" the new job.

If the employee refuses to start work having accepted the contract he will be in breach of contract. However, there is normally very little an employer can do as the employee's breach is unlikely to have caused the employer any significant quantifiable financial loss. However, where the search for the employee in order to perform a particular role or project has itself entailed a significant cost and the employer has appropriately documented this in the contractual terms, then the employee may be liable under these terms for a repayment of these costs under a "no show" repayment clause (***Tullett Prebon Group Limited v Ghaleb El-Hajjali*** *(2008) EWHC 1924*).

2.3 Intention to Create Legal Relations

The parties to the contract must intend both the agreement and its terms to create a legally binding contract in order for the contract to be effective. In a heavily negotiated contract it can often be difficult to identify the point in time when both parties intend to be legally bound by its terms. If either party does not have the appropriate intention then an enforceable agreement will not come into existence, but it should be noted that it is for the party seeking to claim that the intention was lacking to satisfy the civil standard of proof to this effect.

A promise of increased remuneration made by a manager at an office party, for example, was held to be made in a situation where there was no intention to create legal relations, as well as the content of the promise lacking legal certainty (***Judge v Crown Leisure Ltd*** *(2005) IRLR 823, CA*).

2.4 Consideration

In order for a binding contract to come into existence consideration must pass. The payment of salary in return for work performed will usually constitute consideration. It should be remembered that generally the consideration need not have a monetary value and that mutual non-financial promises will suffice, subject to any minimum wage issues. Accordingly, one could also perceive the services of the employee as being consideration for obligations taken on by the employer. This issue is considered in the separate paper on "Changing Terms and Conditions" as the question of consideration is likely to be a more significant issue when a contract is varied and the other party continues to perform as they were already obliged to under the existing terms.

2.5 Certainty as to Terms

The individual terms of the contract must be sufficiently clear and certain for the courts to be able to give them meaning. Terms left to be agreed will not bind either party, as they will be an unenforceable "agreement to agree", but terms which do not yield a precise outcome and rely instead on "reasonableness" can still be enforceable (such as in ***National Coal Board v Galley*** *1958 1WLR16, CA* where the court enforced an overtime provision to work such periods as "might reasonably be required").

In construing the terms of the contract, the courts will apply doctrines common throughout contract laws to clarify and resolve ambiguities. This may include the contra proferentum rule, pursuant to which drafting is construed against the person who proposed the term, which will generally be the employer or its agent. The courts may also look at the circumstances around the creation of the contract such as job adverts, the interview and letter of appointment, but will not generally consider the contractual negotiations themselves, a point reinforced by the (non-employment) case of ***Chartbrook v Persimmons Homes*** *2009 3 WLR 267 HL*, where a clear distinction was drawn between circumstances and negotiations in ascertaining the intentions of the parties.

3 Statutory Particulars

3.1 The obligation

A written statement setting out the basic particulars of employment is required to be given to employees in England and Wales under section 1 and section 3 of the

Employment Rights Act 1996 (a s1 statement). These are minimum requirements and will commonly be contained within a written contract of employment, although they may be provided separately provided certain key terms are set out in a single document.

The information that must be provided in a s1 statement includes basic details of the terms on which an employee is employed, including start date, pay, holiday entitlement, etc.

From 6 April 2020, important changes to recipients and required content were introduced by The Employment Rights (Miscellaneous Amendments) Regulations 2019 ("the Miscellaneous Amendment Regulations"). The changes introduced to sections 1-4 of the Employment Rights Act are that:

- a s1 statement must be provided to all workers, not just to employees; and
- additional information must be included.

These changes result from the government's Good Work Plan that was published in December 2018. The recommendations were aimed at increasing transparency between workers and employers as well as improving the enforcement of employment rights.

The changes did not have retrospective effect, so apply only to new engagements on or after 6 April 2020. However, pre-existing workers are entitled to request a section one statement (including the new, additional information) and such requests must be complied with within one month.

The s1 statement must be provided on or before the date on which the individual's engagement starts, with most information being needed within a single document. However, some elements of the s1 statement may be satisfied by referring a worker to a separate document (provided it is reasonably accessible to them). For example, additional information relating to pensions, collective agreements, any training entitlement and certain information about disciplinary and grievance procedures which is not required in the single document may be provided in instalments within 2 months of the beginning of the engagement.

Note that the term "employer" is retained in the ERA notwithstanding the extension of s1 statements to workers. This terminology is therefore used below to refer to the party by whom the worker is engaged, despite their legal status not being one of employment.

It should be noted that the statutory provision does not prescribe terms, or set out any default terms which will apply. It is simply a requirement that, whether the contract itself is oral or written, certain specified particulars are provided to the employee or worker.

Written particulars only form a contract if both parties have agreed to the terms (***Gascol Conversions Ltd v Mercer*** *(1974) IRLR 155 (CA)*). Furthermore, acknowledgement of receipt of the terms by the employee will not necessarily

mean that the terms are agreed (***System Floors (UK) Ltd v Daniel*** *(1981) IRLR 475 (EAT*)).

As a result, if a separate contract of employment exists which conflicts with the written particulars, the terms of the contract of employment will prevail (***Robertson and Jackson v British Gas Corporation*** *(1983) IRLR 302 (CA)*).

3.2 The particulars which must be given

The following written particulars must be provided in a single document (historically known as the principal statement):

3.2.1 The names of the employee/worker and employer;

3.2.2 The date on which the employment or engagement and, for employees, continuous employment began;

3.2.3 The scale or rate of remuneration or the method of calculating remuneration and the method and timing of payment;

3.2.4 Any terms and conditions relating to hours, including details of normal hours of work;

3.2.5 Terms and conditions relating to holiday entitlement (including public holidays) and holiday pay (which must be sufficiently detailed so that the entitlement on termination can be calculated);

3.2.6 Terms and conditions relating to sickness and sick pay;

3.2.7 Terms and conditions relating to pension and pension schemes (including any other benefits which are provided as part of the pension scheme);

3.2.8 The length of notice which either party must give to terminate the employment contract

3.2.9 Job title or a brief description of duties;

3.2.10 If employment or engagement is not intended to be permanent or is for a fixed term, the date on which it is expected to come to an end;

3.2.11 Any collective agreements which affect terms and conditions or a statement that there are no such agreements;

3.2.12 The employee's normal place of work or if the employee is required or permitted to work at various places, an indication of that and the address of the employer;

3.2.13 Where the employee will be required to work outside the UK for a period of one month or more: the period for which he will work outside the UK; the currency in which he will be paid in and; details of any additional remuneration or benefits;

3.2.14 The disciplinary rules which apply to the employee's employment;

3.2.15 The disciplinary procedure;

3.2.16 The person to whom the employee should appeal against disciplinary and grievance decisions and the procedure to be followed; and

3.2.17 Whether there is a contracting out certificate in force in respect of the employee's employment (pursuant to the Pensions Scheme Act 1993).

The additional particulars required since 6 April 2020 are**:**

- the days of the week they are required to work
- whether the working hours may be variable and how any variation will be determined
- any paid leave (other than paid holiday which already has to be provided) to which they are entitled (e.g. maternity or family leave)
- details of all remuneration and benefits (above base pay)
- any probationary period and the conditions relating to it, and
- any training which is mandatory and/or must be paid for by the individual

If there are no particulars for any of the items listed, that fact should be stated (*section 2(1) of the Employment Rights Act 1996*).

The single document can refer the employee to another source (such as a staff handbook or the intranet) for certain information including incapacity and sick pay, entitlement to paid leave (other than paid holiday), pensions and pension schemes, and training entitlement. Some particulars can also be given in a separate statement no later than two months after employment begins. They are details of:

- pensions and pension schemes;
- collective agreements;
- any training entitlement (although details of compulsory training, and any training the worker has to pay for, must be included in the principal statement); and
- disciplinary and grievance procedures.

3.4 Changes to statutory particulars

Section 4 of the Employment Rights Act 1996 provides that changes must be notified in writing to the employee or worker within one month of the date of the change. Equivalent transitional provisions apply to pre-6 April 2020 employees.

3.5 Sanction

If sections 1 or 4 are breached, the employee or worker can bring a claim to the employment tribunal at any time during the period of their employment or engagement within 3 months if employment/engagement has terminated).

Where terms are disputed, the tribunal's role is to determine the terms it believes the parties agreed to. However, it does not have the power to re-write

the terms or decide what should have been agreed (***Eagland v British Telecommunications plc*** *(1992) IRLR 323 (CA)*).

Where the s1 or s4 claim is brought in conjunction with another successful substantive claim, the tribunal is obliged to award 2-4 weeks' capped pay.

4 Contractual Terms

An employment contract may be oral or written and will always include both express and implied terms, and possibly incorporated terms.

4.1 Express terms

These are terms that have been explicitly agreed, whether oral or written. The parties are free to agree any terms provided they are not contrary to statutory rights or public policy.

However, where the drafting is not clear and unambiguous, the courts will use the tools of construction referred to above in order to ascertain the true intention of the parties.

It is a principle of contract law that express terms will generally take priority over implied terms. However, implied terms can supplement or restrict express terms. In the employment context, this area of potential conflict has created some interesting case law and implied terms have succeeded in significantly reducing the scope of express provisions, for example:

4.1.1 An implied term might deal with something which was overlooked by the parties when drafting an express term (***Aspden v Webbs Poultry & Meat Group (Holdings) Ltd*** (1996) IRLR 521).

4.1.2 Flexibility provisions (such as mobility clauses) should not be exercised in a way which conflicts with the employer's implied duty of trust and confidence (***United Bank Ltd v Akhtar*** (1989) IRLR 507 (EAT))

4.2 Implied terms

Implied terms may arise in a variety of ways:

4.2.1 In fact (to reflect the presumed intention of the parties);

4.2.2 By custom and practice;

4.2.3 By common law;

4.2.4 By statute.

4.3 Implied term – in fact

Terms will be implied as existing "in fact" if either:

The term is required to make the contract or a term of it work properly (the "**business efficacy**" test) (***Jones v Associated Tunnelling*** *[1981] IRLR 477)*; or

The term is "something is so obvious that it goes without saying" (the "**officious bystander**" test) (***Shirlaw v Southern Foundations*** *(1926) Ltd (1939) 2 KB 206*). A term will only be implied under this test if:

4.3.1 It would have been obvious when the agreement was reached; and

4.3.2 It would have been obvious to both parties.

No term will be implied through this route if it is inconsistent with any express terms and a term implied in fact will need to be able to be defined with sufficient precision and clarity.

4.4 Implied terms – custom and practice/conduct

Terms will be implied by reason of the custom and practice of the employer (or even a particular trade) if they are "reasonable, notorious and certain" (***Sagar v Ridehalgh and Son Ltd*** *1931 1 Ch 310)* ("Every weaver in Lancashire knows…..")

Difficulties often arise where you have a history of benefits being described as ex gratia. See ***Albion Automotive Ltd v Walker*** [2002] EWCA CIV 946.

4.5 Implied terms - common law

4.5.1 Both the employer and the employees are subject to the following implied terms:

(i) The duty not without reasonable and proper cause to act in a manner "calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (See ***Courtaulds Northern Textiles Ltd v Andrew*** *1979 IRLR 84 EAT and* ***Malik v Bank of Credit & Commerce International SA*** *[1997] IRLR 462*). Breach of this duty is a fundamental breach of contract, and is often the foundation of a claim of constructive dismissal. Note this duty may overlay an express term. Examples of breaches of this implied duty include:

(a) Bullying or harassment;

(b) Using unacceptable methods to seek to persuade employees to agree to changes in their remuneration (**Cantor Fitzgerald v Bird & others** (2002) IRLR 867);

(c) Swearing or inappropriate comments – In **Morrow v Safeway Stores Plc** (2002) IRLR 9, for example "If you cannot do the job I pay you to do, then I will get someone who can";

(d) Falsely or unreasonably accusing an employee of theft (**Robinson v Crompton Parkinson Ltd** (1978) IRLR 61);

(e) Providing a reference which was misleading and potentially designed to destroy the employee's future career (**TSB v Harris** (2000) IRLR 157);

(f) Issuing oppressive warnings for minor misconduct (**Alexander Russell plc v Holness**); and

(g) Reprimanding an employee in a humiliating fashion in front of colleagues (**Hilton International Hotels (UK) Ltd v Protopapa** (1990) IRLR 316).

(ii) The duty to give reasonable notice of termination of employment.

4.5.2 The main implied terms which impose duties on **employees** are:

(i) To serve their employer with good faith and fidelity (***Faccenda Chicken Limited v Fowler*** *(1986) 3 WLR 288*). Over the years this duty has been extended to include:

(a) A duty to disclose wrongdoing in some circumstances;

(b) A duty not to compete nor divert business opportunities nor solicit staff or customers whilst employed;

(c) A duty to observe confidentiality;

(d) A duty not to disrupt the employer's business or misuse the employer's property; and

(e) A duty to account (i.e. not to make secret profits or accept bribes). (ii) To obey the lawful and reasonable orders or instructions of the employer. (iii) To exercise reasonable care and skill in the performance of their duties.

4.5.3 The main implied terms which impose duties on **employers** are:

(i) To pay the employee for work done provided that the employee properly performs their duties;

(ii) To take reasonable care of the health and safety of employees;

(ii) To deal with any employee complaints or grievances within a reasonable timeframe and in a reasonable manner (***W A Goold (Pearmak) Ltd v McConnell*** (1995) IRLR 516 (EAT)); and

(iv) To provide and monitor a suitable working environment (***Waltons and Morse v Dorrington*** (1997) IRLR 488 EAT).

(v) To indemnify in respect of costs incurred in carrying out their duties

(vi) To provide work, depending on the terms of the contract, see ***William Hill Organisation Ltd v Tucker*** [1998] IRLR 313

4.6 Implied term – statute

In some cases, legislation has introduced statutory employment rights by way of implied enforceable contractual terms, such as:

4.6.1 The right to receive statutory minimum periods of notice (section 86 of the Employment Rights Act 1996);

4.6.2 Equality clauses (section 66 Equality Act 2010, originally section 1 of the Equal Pay Act 1970) which provide for the right to equal pay for men and women who perform like work or work of equal value; and

4.6.3 The limits on working time imposed by the Working Time Regulations 1998.

4.7 Incorporated terms

Contractual terms may also be incorporated from other documents, such as handbooks and policies. Individual contractual terms may also be incorporated from a collective bargaining agreement.

In order for such terms to be incorporated, there must be a clear intention to incorporate those terms. In *Hamilton v Fife Council UKEATS/0006/20* there was a collectively agreed term that a permanent post would not be advertised where a teacher was designated as surplus. The EAT held that, although the term was incorporated into individual contracts of employment, it did not give rise to enforceable individual rights. Instead, the EAT decided that, due to its vagueness and lack of details, the term regarding advertisement was not intended to confer the right on H to prevent the employer from advertising a vacant post.

4.8 Overview of some common contractual terms

Mobility: Normally, an employer will include an express clause in the employee's contract requiring them to carry out any reasonable duties and making provision for a change of location, job description and duties. It's not strictly necessary, but it will help the employee to understand the position.

The written statement of terms should set out the place/s of work; and as mobility clauses are implied in fact, employers should make appropriate provision in the contract where mobility is an issue.

Sometimes, an employee will have an implied duty of mobility,, e.g. for business efficacy, where the employee is required to work within reasonable commuting distance of their home. Senior employees are likely to have fewer restrictions on their mobility, as nothing requires an employer to remain at its original location, nor is there an implied geographical limitation on the place where a senior

employee is required to work (***Little v Charterhouse Magna Assurance Co*** *[1980] IRLR 19*).

If it's on a temporary basis, an employee may be required to transfer to other suitable work where the business required it. The employer must not reduce the employee's wages during such a temporary transfer.

The employer should also be careful to ensure that even if there is an express mobility clause in the contract, reasonable notice must be given to avoid breaching the term of trust and confidence.

Confidentiality: There is a common law duty of confidentiality implied into every contract of employment so employers can protect confidential information while the employee is employed. However, in the absence of an express provision, protection after termination will extend only to information which is so confidential as to amount to a trade secret (***Faccenda Chicken Ltd v Fowler*** *[1986] IRLR 69*).

Confidentiality of information is likely to be particularly important at more senior levels of employment. An employer should consider to what information a senior employee will be exposed and ensure any express terms cover all the types of information which it considers to be confidential and to which the employee would have access. In particular, the clauses should be amended if either the employer or the employee will have to enter into confidentiality agreements with the employer's business contacts (for example, clients) relating to their confidential information.

Note that any confidentiality clause will be void insofar as it purports to prevent the making of protected disclosures (section 43J, ERA 1996). However, it is not thought that the lack of a specific "carve-out" for protected disclosures will render the clause void in its entirety. Rather, the confidentiality obligation will be interpreted as not preventing the protected disclosure.

Intellectual property: In most cases, provided that there is an employment relationship, all intellectual property rights generated by an employee during the course of their employment are owned by the employer and, unless the employer agrees otherwise, the employee cannot benefit from them. Even so, it can be helpful to define "duties" (e.g. in the employee's job description) to cover the development of intellectual property and inventions, provided only genuine duties are included.

Where the employee has a special obligation to further the interests of the employer (for example, the employee is an executive director), the employer has a more powerful argument that rights in an invention belong to it, even where the invention was invented
outside the course of the employee's normal duties. The employer can use an express clause to make this position clear. However, the special obligation must genuinely apply, so employers should not normally use such a clause in relation to non-directors.

Employees have limited moral rights (for example the right to be identified as the author) in copyright works, such as specifications and diagrams.
Such rights cannot be transferred to an employer but the employee can expressly waive them. If the employee waives these rights, the employer does not have to state that the employee is the author. Further, various other limited rights, for example the right to object to derogatory treatment of a copyright work (defined as "mutilation or distortion" of the work affecting the reputation of the author), will not then apply.

For contracts with parties other than employees, it is essential that details on ownership of intellectual property rights are included because in those cases (except for commissioned design) the author, contractor or other self-employed person retains ownership. The person paying does not automatically obtain ownership.

A power of attorney clause may be appropriate where there is an expectation and/or intention that significant and valuable intellectual property will be created during the course of employment. It means that, in the event that the employer needs to enter into further agreements relating to intellectual property rights, the power of attorney clause allows it to arrange for another party to sign on the employee's behalf (for example if the employee has left the organisation) without the employer having to track down and inconvenience the employee. Therefore, it can be in the interest of both parties to include the clause. Where a power of attorney clause is included, the agreement on the protection of intellectual property rights must be executed as a deed.

It is advisable for a specialist intellectual property colleague should be involved, especially if drafting express terms for a client where IP rights form a significant part of the business (e.g. a pharmaceutical company producing patentable products) or if it is important to the client that inventions or copyright works of the employee should belong to the employer (for example where the employee is the director of research and development or will be producing significant copyright material such as reports, papers etc). In addition, if foreign IP rights are involved, advice from overseas specialists might be needed in case the local IP law has an impact.

Bonus and incentives: When drafting an employment contract, in describing bonus and other incentive schemes available to an employee, it will be in the employer's interests to incorporate as much flexibility as possible. If the bonus is to be discretionary, a number of questions will arise. First, is there discretion as to whether the employee will be considered for a bonus or does the discretion apply only to the amount of the bonus to be awarded? Second, if the amount is discretionary, what factors will the employer take into account? Performance will often be a guiding criterion but that itself has different elements: company versus individual performance; rewards for past performance versus future performance.

The contract should set out the extent of the employee's entitlements to any bonus payments upon termination of the employment. There are various options for an employer to consider. The employee might only qualify for a bonus if they remain in employment (and are not under notice of termination) at the end of the

bonus year or at the bonus payment date. Clauses such as these have in the past been subject to legal challenge under the Unfair Contract Terms Act on the basis that they are unreasonable exclusions and therefore void. The case law, however, has clarified that UCTA does not apply in the employer/employee scenario and these sorts of forfeiture clauses will be enforceable provided they are drafted clearly enough. If there is any doubt that will often be resolved in favour of the employee on the basis of the contra proferentem rule.

Bonus clauses may sometimes differentiate between the circumstances in which an employment relationship might end and provide for bonuses to be payable to "good leavers". Again, there are many ways of describing a "good leaver". Sometimes, it will be an employee who leaves in circumstances other than resignation or gross misconduct dismissal. In other cases, good leavers will be those leaving for ill health, redundancy or retirement.

Occasionally, employers will try to exclude an employer who leaves having performed poorly. The question then is how to draft for poor performance. Potential criteria might be a company's share price, level of profits generated or achievement of individual targets.

Lay-off and short-time working: Historically, lay-off and short-time working has been prevalent in industries where work tends to fluctuate, although recessions and, of course, the COVID-19 pandemic have highlighted the possible advantages of wider usage, as companies try to find ways to reduce costs in a downturn without permanently losing skilled staff through redundancy.

Broadly speaking, short-time working is a temporary reduction in the hours or days worked during a given week, and lay-off involves giving an employee no work during a week while still retaining them as an employee.

Employers may not automatically have the right to lay staff off or reduce their hours just because there is less work. There should be no problem for an employee with no guaranteed hours or pay, working under a casual or zero-hours contract, as the contract does not guarantee a certain level of income. However, where the employee is engaged on a fixed salary or weekly wage, the employer will remain liable to pay the employee unless there is either an implied right (usually through custom and practice) or express wording in the contract permitting lay-off or short-time working.

A contractual provision allowing lay-off or short-time working does not necessarily mean the employee will receive no pay for days or weeks in which they are not working. An employee with normal working hours who is not provided with work for any complete day during which they would normally be required to work under their contract is entitled to be paid a statutory guarantee payment (SGP) by their employer if either:

- There is a reduction in the requirements of the employer's business for work of the kind which the employee is employed to do.
- There is any other occurrence which affects the normal working of the business in relation to this type of work.

Note also that in some circumstances, employees who are laid off or put on short-time working (or a combination of the two) for four consecutive weeks, or a total of six weeks in any 13, have a right to terminate their employment and claim a statutory redundancy payment (*sections 147-152, ERA 1996).*

Collective agreements sometimes give employers the right to impose lay-off or short-time working. If the agreement is incorporated into the employee's contract (either expressly or by custom and practice) there is no need for a separate express clause in the employment contract.

5 Remedies for Breach

5.1 Employee breaches

If the employee breaches the contract of employment, the employer has the following options:

5.1.1 take disciplinary action up to dismissal;

5.1.2 sue for damages for the breach of contract (although unlikely to be able to show loss); and

5.1.3 seek equitable remedies, such as injunctive relief, but only as to negative obligations. You cannot get specific performance of a contract of personal service.

5.2 Employer breaches

If the employer breaches the contract of employment, the employee has the following options:

5.2.1 waive the breach;

5.2.2 accept the breach and resign in circumstances which amount to constructive dismissal;

5.2.3 not accept the breach, affirm the contract as it was before the breach, but reserve the right to claim damages for the breach (often referred to as "working under protest");

5.2.4 if the employee is dismissed in breach of contract, e.g. without a payment in lieu of notice he will have a claim for wrongful dismissal;

5.2.5 seek equitable remedies (However, a court will not order specific performance of a contract of employment once it has been breached (Ridge v Baldwin (1964) AC
40). Equitable remedies are not available in the Employment Tribunals so applications must be pursued in the High Court or county court (which have different cost regimes);

5.2.6 sue for debt if a wages claim. Note they can also bring an unlawful deduction of wages claim in an employment tribunal; and

5.2.7 consider availability of statutory claim, where the contract contains terms implied by statue, e.g. the equality clause.

Remember a wrongful dismissal case is not the same as an unfair dismissal case. One is a breach of contract, the other derives from a statutory right.

5.3 Accepting a repudiatory breach

A repudiatory breach of contract is a breach that is sufficiently serious to entitle the other party to treat the contract as terminated with immediate effect. If a wronged party wishes to accept the repudiatory breach of the other party, and sue for damages, it must do so without unreasonable delay and must not otherwise act in a manner which can be said to waive the breach.

5.4 Damages

Damages for breach of contract are subject to the principle that the wronged party must take steps to mitigate their loss. However note that where there is a pay in lieu of notice clause the wording may mean no mitigation is required. See ***Cerebus Software Ltd v Rowley*** *[1999] IRLR 690.*

In exceptional cases, the employee may also be able to claim other types of damages:

5.4.1 For psychiatric illness arising from an unlawful suspension (***Gogay v Hertfordshire County Council*** *(2000) IRLR 703 (CA)*); and

5.4.2 For damage to reputation, provided that normal requirements of causation, remoteness and mitigation are satisfied (***Malik v BCCI SA*** *(1997) IRLR 462 (HL)*).

However, an employee cannot recover damages for the loss of the chance to claim unfair dismissal (***Harper v Virgin Net Ltd*** *(2004) IRLR 390 (CA))* or for the manner in which a dismissal is carried out (***Johnson v Unisys*** *(2001) 1 AC 518 (HL*)).

5.5 Injunctions

Injunctive relief is most commonly sought in the employment context in relation to an actual or anticipated breach by the employee. An employer may be able to obtain an injunction in order to prevent the employee from committing or continuing to commit acts which are in breach of contract. It should be noted that this remedy will cease to be available if the party seeking to rely on a contractual terms has itself committed an earlier repudiatory breach which has been accepted by the other party. ***Tullett Prebon PLC v BGC Brokers LP and others*** *[2011] IRLR 420* provides a good example of the complexity a court may face to ascertain whether the employer seeking to enforce post-termination restrictions has itself already committed a repudiatory breach of contract at the time of seeking to enforce such restrictions.

The basic rule is that a court will not grant an emergency injunction unless:

5.5.1 There is an arguable case that a breach of contract has occurred;

5.5.2 The "balance of convenience" justifies such an order; and

5.5.3 Damages would not be an adequate remedy. *(**American Cynamid Co v Ethicon Ltd** (1975) WLR 143 (HL)*).

In very limited circumstances, employees of a public body may be able to make an application for Judicial Review.

5.6 Discretionary payments

Parts of an employee's remuneration (such as bonus) may be discretionary. Implied terms can impact upon an employer's discretion under such clauses. In ***Clark v BET plc*** *(1997) IRLR 348*, the High Court held that the discretion should not be exercised capriciously or in bad faith, but this will generally be a high threshold for employees to establish. It should also be noted that the scope and exercise of the discretion may itself be subject to express contractual terms, for example that the employer will only receive a payment at all if he remains in the employment at the payment date.

5.7 Repayment clauses

The employer may seek to rely on a clause providing for repayment of amounts awarded to an employee who resigns or breaches their contract. The attitude of the courts to such clauses has not been consistent, and there remains a significant risk that a clause requiring an employee to repay remuneration may be unenforceable if it amounts to:

5.7.1 a penalty clause (it imposes a detriment on the employee which is out of all proportion to any legitimate interest of the employer in the event the employee resigns or breaches their contract); or

5.7.2 an unreasonable restraint of trade (employee relinquishes "some freedom which he would otherwise have had" – ***Sadler v Imperial Life Insurance Company of Canada Ltd*** *(1988) IRLR 388 (HC)*).

Linklaters
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