

Labour Relations Agency

Improving employment relations

Advice on agreeing and changing contracts of employment

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Labour Relations Agency
Head Office, 2-8 Gordon Street, Belfast BT1 2LG
Phone: 028 9032 1442

Regional Office, 1-3 Guildhall Street, Londonderry BT48 6BB
Phone: 028 7126 9639

Website: www.lra.org.uk

E-mail: info@lra.org.uk

This guide provides practical advice and guidance on agreeing and changing contracts of employment. We have provided legal information for guidance only. This information should not be regarded as a complete or authoritative statement of the law, which can only be given by the courts. If you need more help, you can contact us (our contact details are at the front of this booklet).

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Introduction

Changes occur in working relationships and contracts of employment for all kinds of reasons. Problems can usually be avoided or resolved through discussion. This Guide is intended to give general advice and guidance about the main legal considerations which may arise when employers or employees wish to make changes to the contract of employment.

The first section of the Guide provides information on what a contract of employment is and the various terms associated with it. The remainder of the guide provides information and advice on the various ways that changes can be made to a contract of employment.

The Guide is not an authoritative statement of the law; determining the law or interpreting the status of a contract of employment is a matter for the tribunals and the courts.

Every effort has been made to ensure that the information contained in the Guide is accurate, but it should be emphasised that the changing of contractual terms can be a complex legal matter. Therefore, it is advisable to seek independent advice when seeking to change a contract of employment.

Contracts of Employment

A contract is a promise, or a set of promises, that the law will enforce. In the context of an employment relationship the employee usually promises to perform certain tasks for the employer, who, in turn, promises to pay the employee a wage. A contract in an employment relationship is normally established when an offer of employment is made and accepted, monetary consideration is exchanged in return for the work undertaken and where the employer and employee intend to be legally bound by the agreement.

A contract does not have to be in writing (with the exception of a contract of apprenticeship which must be in writing), its terms can be written, oral, implied or a mixture of all three. If no documented contract of employment exists beforehand, one will be implied as soon as an employee starts work and, by doing so, demonstrates that he or she accepts the job on the terms offered by the employer.

Types of contracts in employment

There are a number of different types of contracts in an employment related context and these include:

- contract of service – includes part-time, full-time, fixed term, permanent;
- contract for services – where a self employed person provides a genuinely independent service;
- contract of apprenticeship – of a fixed period to provide training and/or experience in a particular trade. This includes ‘traditional’ and ‘modern’ apprenticeship arrangements;
- contract of training – where the purpose is to provide training.

This Guide is concerned with the contract of service (contract of employment), where an individual (an employee) performs a job role and receives a wage for doing so.

Employment Status

Whether someone is an employee working under a contract of employment (contract of service) or a genuinely independent self-employed person working under a contract to provide services depends

upon the true nature and operation of the agreement entered into by the parties.

- If the individual can decide whether to accept work and how to carry it out, makes their own arrangements (including cover/substitution) for holidays and/or sickness absences, pays their own tax and national insurance contributions and is free to do the same type of work for more than one employer at the same time, this points towards the person being self-employed.
- If the employer has a general obligation to provide work and the individual is obliged to accept the work offered, the employer controls when and how that work is done, supplies the tools or any equipment needed to do it and pays tax and national insurance contributions on the individual's behalf, then it is likely that the individual concerned is an employee.

If a dispute arises in which the employment status is in doubt, this will be determined by the Industrial Tribunal or the court concerned, having taken account of the factors relevant to the case. The Industrial Tribunal applies a series of 'tests' in order to determine the appropriate employment status. For example, the control test – where the tribunal will examine the amount of control exerted by the 'employer' over the individual to determine whether the person was truly an employee or self employed person.

Contract terms

Contract terms are the rights and obligations which bind the parties to the contract. There are a number of different terms which make up the contract of employment. These include express, implied, statutory and those terms that have become established through custom and practice. Each of these terms is discussed below.

Express terms

Express terms are the terms which are mutually agreed and understood by the employer and employee and may be written down or verbally agreed. Express terms may be established through various sources, which could include:

- the written statement of particulars of employment (to which employees are entitled to receive within 8 weeks of commencing employment under the law) - see page 5 for more information on the written statement;
- the letter of appointment;
- written or oral statements made by the employer and accepted by the employee.

Express terms may also be introduced into individual contracts by what is known as incorporation. An incorporated term is one which becomes an integrated part of the contract after agreement to it has been reached in another forum or via other documents such as employee handbooks. The most common example of an incorporated term is a term which has its origins in a collective agreement between an employer and a trade union.

A collective agreement between an employer and a union is not usually a legal contract and is generally an agreement in honour which cannot be enforced in the courts. However, the terms of the collective agreement may be “incorporated” into the individual contract of employment, ie, there may be an express statement in the written statement of particulars which indicates that specific collective agreements apply to the individual’s employment, eg, the right to receive an enhanced redundancy payment which is collectively agreed between a trade union and employer may become incorporated into the individual contract of employment. In such circumstances the terms become enforceable in law.

Implied terms

Implied terms are those that are not expressly written or verbally agreed but which are, nonetheless, included in contracts of employment. Terms are implied, for instance, because they are:

- too obvious to mention or because the parties assumed they would be part of the contract at the time the contract was entered into, eg, that the employee will not steal from the employer or that the employer will provide a safe working environment;

- necessary to make the contract workable, eg, that an employee employed as a driver will hold a valid (clean) current driving licence;
- the custom and practice of the business or industry, ie, where a clear, certain and longstanding custom or practice has been adopted over a significant period of time (see 'Custom and Practice' below).

Both employers and employees are obliged to, among other things; adhere to implied terms of a contract. Employers have an implied duty to pay wages, provide work, provide safe working conditions, and maintain mutual trust and confidence in the employment relationship.

Employees have an implied duty to co-operate with their employer, to provide personal and faithful service to the employer and to take reasonable care for the health and safety of themselves and their colleagues.

Statutory terms

Statutory terms are those implied or imposed by employment law, eg, the right for an employee to be paid the National Minimum Wage or for equality of pay between males and females as provided for by the Equal Pay Act (Northern Ireland) 1970.

An employee cannot be asked to waive their rights to terms of employment that are provided for by the law and any agreements to contract out of statutory terms are normally void under the law.

Statutory terms (of which there are many) include, for example, the right to receive:

- a written statement of employment particulars (see below);
- an itemised pay statement;
- minimum periods of notice to terminate a contract of employment;
- time off for public duties;
- a redundancy payment for those employees with at least two years' continuous service, etc, etc.

Written statement of employment particulars

The Employment Rights (Northern Ireland) Order 1996 states that all employees whose employment is to last for one month or more are entitled to be given, within two months of the date the employment starts, a written statement setting out the main particulars of employment. The statement of employment particulars is not the contract of employment but it does provide the basis for and evidence of many of the contractual terms.

This statement will not necessarily cover every contractual term, but will constitute important evidence of the principle terms. It must include particulars such as the rate of pay and payment periods, holiday entitlement, job title and description of the role, place of work, duration of employment, notice entitlements and requirements, etc.

Further information about the right to a written statement can be found in the Department for Employment and Learning (DEL) Employment Rights Booklet ER 2 “Written statement of employment particulars” which can be downloaded at

<http://www.delni.gov.uk/index/publications/pubs-employment-rights/erbooklets/er2.htm>

The written statement is a very important document. The Agency provides a service for employers to enable them to draft, tailor and issue the statement to their employees. Further information on this service is available at <http://www.lra.org.uk/index/workshops-and-seminars/workshops.htm>

Custom and Practice

Certain terms of employment may become established or implied into the contract of employment by custom and practice. In the absence of any express or written terms of employment this is often the only way that an employee can establish their entitlement to important contractual rights. For a term to be implied by custom and practice it must be:

- reasonable – it is the norm within the industry in which the employee works;
- certain – clear to all and not capable of being interpreted in different ways by different people; and
- notorious – well known to all to whom it relates and should have been in existence for a considerably lengthy period of time.

Terms which could be viewed as implied by custom and practice could include the provision of transport to work, rest breaks, finishing times, commissions, entitlements to overtime payments, etc, where these terms are not clearly expressed elsewhere.

Change of contract

General Issues

An employer may wish to negotiate and agree changes to the terms of a contract because of changed economic circumstances or due to a reorganisation of the business. Possible areas of change could include pay rates; hours or days worked; duties; supervisory relationships or place of work. There are restrictions on the changes that can be agreed if the reason for doing so arises out of a transfer of an undertaking, for example, when a business or part of one is transferred to a new employer.

Further information on the employment issues arising from the change of ownership of a business can be obtained in the Agency's Information Note 6, Transfer of Undertakings (Protection of Employment) Regulations which can be downloaded at http://www.lra.org.uk/index/agency_publications-2/advice_and_guidance_on_employment_matters-3/information_notes-2/no.-6-transfer_of_undertakings_protection_of_employment

An employee may seek to change the contract to bring about improvements in pay or changes to working arrangements, for instance by requesting additional holidays or by making a request for a flexible working pattern.

A trade union that conducts collective bargaining on behalf of a group of employees may also seek to change the terms of a contract to bring about improvements in, for example, pay and other benefits.

However, the contract of employment is legally binding on employees and employers. **This means that it is unlawful for one party to make changes to the contract of employment without the agreement of the other.**

However there are circumstances where change is necessary even if agreement cannot be reached and this is discussed under “Failure to reach agreement” on page 9 of this guide.

A contract of employment may contain express terms which permit an employer to make changes to the contract. Through mobility or flexibility clauses, for example, an employer may expressly reserve the right to require an employee to work at a different location, or to alter the employee’s duties. The contract may therefore be drafted to permit foreseeable changes to be made within the terms of the existing contract, eg, where there is a potential need to transfer an employee to a different workplace. Such terms should be wide enough to cover the proposed change and be clearly phrased in order to give employers a wide discretion to make changes.

It is always open to either party to seek to renegotiate the contract of employment with the other. A change may be made by agreement between the employer and the employee.

Change by an Employer

Reaching Agreement

Changes to a contract of employment by an employer should be capable of justification, i.e., necessary for economic, technical or organisational reasons. For example, an employer may wish to change the hours of work to increase production or service at a time when it is necessary to do so or change an employee’s duties to fit into a re-organised structure. Such contractual changes may be temporary or permanent in nature as agreed.

Consultation about Proposed Change

In the first instance an employer should consult with the employees concerning the proposed changes with a view to reaching agreement. This could include consultation with employee representatives, eg, trade union representatives, representatives of any relevant information and consultation forum, or individual employees - where there are no representative structures.

In certain circumstances where the proposed change is likely to be less acceptable to employees an employer may also decide to negotiate (reach a deal) with the workforce in order to reach agreement. This is common where the change is viewed as a reduction in terms, eg, 'buying out' of terms such as guaranteed overtime or free transport.

Providing Written Notification of Agreed Change

Where agreement is reached by consultation or negotiation with representatives or individuals it is recommended that written notification of the process as it happens and the agreed change is provided to all employees. If a change of contract affects one or more of the particulars of employment that are required by law to be detailed in the Written Statement then each employee must be given written notification of this change. The notification must be given as soon as possible, and at any rate no later than one month after the change is made.

Failure to Reach Agreement

If an employer has been unable to reach agreement with employees on a proposed change to a contract they may decide to either drop the matter or to dismiss and re-engage the employees on the new contract of employment. In this instance there is no break in employment i.e. continuity of employment is preserved. An employer must not take a decision to dismiss and re-engage employees without first conducting consultation regarding the change.

In addition employers will be required by law to follow collective redundancy consultation procedures where they intend to impose changes to a contract of employment of a group of employees by terminating their existing contract. This requirement applies where the employer proposes to dismiss and re-engage 20 or more employees¹.

Further information on collective consultation can be found in the Agency's Advisory Guide - Advice on handling redundancy. This can be downloaded at

¹ The numbers of employees involved in the dismissal and re-engagement is important as there are consultation related issues that may be applicable. It is recommended that specialist advice be sought when contemplating dismissal and re-engagement of a group of employees.

http://www.lra.org.uk/index/agency_publications-2/advice_and_guidance_on_employment_matters-3/advisory_guides2http://www.lra.org.uk/index/agency_publications-2/advice_and_guidance_on_employment_matters-3/advisory_guides2/advice_on_handling_redundancy-2.htm

If an employer is dismissing and offering re-engagement to the employees on the new contract of employment, which includes the change, they must ensure the contract is terminated with the appropriate level of notice. Proper notice will be as specified (or implied) in the employee's contract, or will be the minimum statutory notice period, whichever is the longer. Further details of notice entitlement can be found in DEL Booklet ER 15 "Rights to notice and reasons for dismissal". This can be downloaded at

<http://www.delni.gov.uk/index/publications/pubs-employment-rights/erbooklets/er15.htm>

Statutory Disciplinary and Dismissal Procedure

While the dismissal and re-engagement situation described above does not create a break in employment it does nonetheless amount to a termination of employment and therefore the Statutory Disciplinary and Dismissal procedure (detailed below) could apply to the termination. The circumstances in which this procedure applies are discussed here:

- If an employer is dismissing and offering re-engagement to all the employees in the organisation or in a particular category or role then they are **exempt** from following the Statutory Dismissal and Disciplinary Procedure detailed below. In each case the dismissal should be notified to the employee in writing, giving appropriate notice and offer re-engagement before or upon the effective date of termination. If the employee(s) accepts the new terms then continuity of employment is preserved. This is generally viewed as a 'some other substantial reason' for dismissal and is a potentially fair reason for dismissal.
- However, if an employer is seeking to change the terms of contract of one or more individuals, rather than the whole section or category to which the employees belong, then an employer **is obliged to adhere** to the Statutory Dismissal and Disciplinary Procedure as detailed below. The employer should offer re-

engagement on the revised terms before or upon the effective date of termination.

Statutory Dismissal and Disciplinary Procedure:

Step 1) the employer should write to the employee to explain the reasons why dismissal is being considered, the time and place for a meeting to discuss the issues, and the fact that the employee has the right to be accompanied.

Step 2) the employer should hold a face-to-face meeting to discuss the problem. After the meeting the employer must inform the employee of the decision and of their right to an appeal. The meeting must not take place unless the employer has provided the employee with information to provide the basis of the reasons for dismissal as outlined in Step 1 and the employee has had time to consider this information.

Step 3) the employer should hold an appeal meeting, if the employee has appealed the employer's decision.

For further information on the Statutory Dismissal and Disciplinary Procedure, see the Labour Relations Agency Code of Practice – Disciplinary and Grievance Procedures. This can be downloaded at http://www.lra.org.uk/index/agency_publications-2/advice_and_guidance_on_employment_matters-3/codes_of_practice-2/disciplinary_and_grievance_procedures-2.htm

Under the law a termination of employment as outlined above will be regarded as a dismissal and it will be open to all eligible (normally those who have more than one year's continuous service) employees to claim unfair dismissal before an Industrial Tribunal – whether they refuse to accept the new contract and leave, or are dismissed under the old contract and re-engaged. Whether the employees are successful in their claim or not will be dependent on the individual circumstances of the dismissal situation and the reasonableness of the employer's action in choosing to dismiss. This can be a complex area especially with regard to issues such as: working under protest, constructive dismissal, delays in refusal to accept, collectively agreed amendments and so on.

Imposing Change without Agreement

If an employer imposes changes in contractual terms without the agreement of the employee, or without dismissing and re-engaging the employee, then there will be a breach of contract. This is called a unilateral variation of contract. It should be noted that the presence of a unilateral variation clause in the contract does not mean that changes imposed are lawful. In this situation an employee has a number of options open to them and these are discussed below.

Accept the change

An employee may decide to agree to the change and continue in their employment. If an employee finds a change of contract unsatisfactory but nevertheless continues to work under the new contract without making his or her objections known to the employer, he or she could, after a time, be deemed to have implicitly accepted the change and it would then become incorporated into the contract.

Resign and claim constructive dismissal

Where an imposed change involves a significant change to the contract, eg, a reduction in pay or alteration of working hours, an employer may well be acting in fundamental breach of contract. Where there is a fundamental breach going to the root of the contract, the employee may treat the breach as bringing the contract to an end and resign and leave the job. If the employee has the necessary qualifying service (one complete year²) the employee will have the right to make a claim of constructive (unfair) dismissal to an Industrial Tribunal. The Tribunal, in the first instance, will have to decide whether the new terms are so substantially different as to be an entirely new contract and not just a change of the old one. In coming to a decision the tribunal will take into account whether the employer acted reasonably in all the circumstances of the case. An employee, prior to taking a claim of constructive dismissal, must first raise a grievance in writing under the Statutory Grievance Procedure - see Appendix for details.

² This is the normal qualifying service for Unfair/Constructive Dismissal, but there are exceptions to this, where for example the dismissal (including constructive) is for a discriminatory reason or for asserting a statutory employment right.

Pursue a claim for breach of contract

Whether the breach is fundamental or not an employee may pursue a claim for damages for breach of contract. This can be done in two ways:

1. if the contract is at an end then the claim can be taken to the Industrial Tribunal where the maximum damages are limited to £25,000³; or
2. if the contract is ongoing the employee may pursue a claim at the County Court or other civil court – this is discussed in more detail under ‘work under protest’ below.

Work under protest

An employee may decide to ‘stand and sue’ – where they work under the new terms but under protest. It is advised that an employee sets this out in writing to their employer immediately on the imposition of a change, so as not to be viewed as implicitly accepting the change. In these circumstances the employee will retain the right to seek damages from the employer for a breach of contract and/or a declaration from the courts that the employer must abide by the original terms. Claims for damages in these circumstances must be pursued through the Civil Courts as the Industrial Tribunal does not have jurisdiction to hear complaints of breach of contract unless they arise out of a termination of employment.

The fact that an employee has set out their disagreement in writing could be viewed as providing another opportunity for the employer to address the issue further and perhaps negotiate further on the issue to reach agreement. However, this can be legally complex and is impacted upon by things such as timing, how long the working under protest continues or how long the employee waits to decide to leave and claim constructive dismissal.

³ The normal forum for pursuing such a claim is a County Court or other civil court. However, a claim may be made to an Industrial Tribunal if it: arises or is outstanding on the termination of the employee's employment; and does not relate to one of the following special categories: personal injury; a term requiring the employer to provide living accommodation for the employee or imposing an obligation in connection with the provision of living accommodation; a term relating to intellectual property (including copyright, rights in performances, moral rights, design rights, registered designs, patents and trademarks); a term imposing an obligation of confidence; or a term which is a covenant in restraint of trade.

Refuse to accept change

An employee may refuse to agree to the new terms, thereby placing the onus upon the employer to take action that they feel is appropriate – this could include dismissal for ‘some other substantial reason’ as discussed above.

Pursue a claim for unlawful deductions from wages

If the breach results in a reduction in pay, eg, reducing overtime or hourly rates of pay, or reducing an employee’s working hours, an employee could potentially argue that this amounts to an unlawful deduction from wages and pursue this claim to the Industrial Tribunal while remaining in employment. An employee must ensure that they raise a complaint in writing under the Statutory Grievance Procedure (see Appendix for details) first and wait at least 28 days before taking a claim to the Industrial Tribunal.

Change by an Employee

An employee may also wish to change their contract of employment, although they cannot lawfully change their contract without their employer’s agreement. Reasons that an employee may wish to seek a change could include:

- to individually/collectively negotiate an improvement in pay and contractual terms;
- to change their duties through an increase or reduction;
- to seek a transfer within the organisation or to a different location;
- to seek a break, eg, career break;
- to request a flexible working pattern;
- to request confirmation of permanent employment status by a fixed-term employee in the event that they have 4 years service;

With the exception of the latter two points, an employee does not have a legal right to have their request for a change considered. However there may be provision within the contract of employment, eg, transfer request policy, which does permit such a change to be requested. In the absence of such a policy it is, nonetheless, important, in the interests of good employment relations for an employer to give due consideration to

an employee's request for a change, and when it is reasonable and appropriate, agree to the change. An employer and employee could agree to a trial period under the new terms to ascertain whether the change would work in the longer term. Such trial arrangements should be carefully documented for the avoidance of future doubt.

Where a change has been agreed to, it is recommended that this is confirmed in writing. If a change of contract affects one or more of the particulars required by law to be covered in the employee's written statement of employment particulars, then the employee must be given written notification of this. The notification must be given as soon as possible, and at any rate no later than one month after the change is made.

Employers should take care to ensure that they act fairly and reasonably in considering and agreeing to changes by employees to avoid any claim of discrimination, e.g. an employer who agrees only to requests made by employees with long service could be found to be discriminating against younger workers who are more likely to have less service.

Right to Request Flexible Working

Employees who have children under the age of 6⁴ (or disabled children under the age of 18) or carers of adults have the right to make a request for a flexible working pattern. This could include, for example:

- part-time working;
- flexi-time;
- staggered hours;
- compressed working hours;
- job sharing;
- shift working;
- working from home;
- term time working.

Qualifying employees have the right to make a request and to have their request considered appropriately, which must be in line with the correct procedure. Further information on the right to request is available in the DEL Booklet ER 36 'Flexible Working: a guide for employers and employees'. This can be downloaded at <http://www.delni.gov.uk/index/publications/pubs-employment-rights/erbooklets/er36.htm>

⁴ The right to make a request for flexible working is likely to be extended to parents of children up to the age of 16 from April 2009.

Change by Collective Agreements

Where an employer has a recognition agreement with a trade union for the workforce or a group of workers within the workforce then the trade union may seek to conduct collective bargaining with the employer to secure existing contractual provisions or bring about improvements in those contractual terms which are covered by the recognition agreement. This usually includes pay, hours and holidays. A collective agreement is one made between, on the one hand, an employer or an association representing employers and, on the other, a trade union representing employees.

The contract may provide for its terms to be varied by a particular collective agreement even if the employee is not a member of a trade union. For example, collectively negotiated pay agreements can be incorporated into all employees' contracts. An employee's written statement of employment particulars must specify any collective agreements that directly affect his or her contract, including, where the employer is not a party, the identities of the parties. Therefore, where a trade union successfully reaches agreement with the employer to change contractual terms, this will therefore bring about an 'incorporated' change to the employee's contract of employment.

Further information on the disclosure of information to Trade Unions for Collective Bargaining purposes, is available in the Agency's Code of Practice which can be downloaded from

http://www.lra.org.uk/index/agency_publications-2/advice_and_guidance_on_employment_matters-3/codes_of_practice-2/disclosure_of_information_to_trade_unions_for_collective_bargaining_purposes.htm

Summary

A contract of employment is a legally binding agreement between an employer and an employee which contains a number of contractual terms including those which are expressly agreed, those that are implied, those that are required by law and those that are established through custom and practice. Both employers and employees may seek to change these contractual terms and lawful changes have the agreement of both parties. Changes that are unilaterally imposed by

one party are viewed as unlawful and may be challenged in a number of ways through the Industrial Tribunal/Civil Courts. Employers should in the first instance consult with employees or their representatives to seek agreement to make changes to the contract of employment.

Further assistance in this complex area of employment law can be obtained by contacting the Agency's enquiry point at 028 9032 1442.

Appendix

Employees must complete step 1 of the statutory grievance procedure (and wait 28 days) if they want to use the grievance as the basis of an application to an industrial tribunal.

The statutory grievance procedure is as follows:

Step 1 - Statement of grievance

- The employee must set out the reasons for the grievance in writing and send the statement (or a copy of it) to the employer.

Step 2 – Meeting

- You must invite the employee to a meeting to discuss the grievance.
- The meeting must not take place unless:
 - 1) the employee has told the employer what the grievance was when they made the statement under step 1; and
 - 2) the employer has had a reasonable opportunity to consider their response to that information.
- The employee must take all reasonable steps to go to the meeting.
- After the meeting, the employer must tell the employee their decision about the grievance and about their right to appeal against the decision if they are not satisfied with it.

Step 3 – Appeal

- If the employee wants to appeal, he or she must tell the employer.
- If the employee says they want to appeal, the employer must invite them to another meeting.

- The employee must take all reasonable steps to go to the meeting.
- After the appeal meeting, the employer must tell the employee their final decision.

Industrial tribunals may adjust any award of compensation by usually between 10% and 50% if either side has failed to follow relevant steps of the **statutory procedure** where it applies.

Labour Relations Agency
Head Office, 2-8 Gordon Street, Belfast BT1 2LG
Phone: 028 9032 1442

Regional Office, 1-3 Guildhall Street, Londonderry BT48 6BB
Phone: 028 7126 9639

Website: www.lra.org.uk

E-mail: info@lra.org.uk