

International Labour and Employment Compliance Handbook

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Edited by Salvador del Rey and Robert J. Mignin

Labour and Employment Compliance in England

Third Edition

Tony Hyams-Parish



Wolters Kluwer

International Bar Association

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England

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Legal Compliance in England

1. LEGAL FRAMEWORK: EMPLOYMENT LAWS

Employment law in England has three main sources:

(a) *Contract:*

The relationship between the employer and the employee is governed at common law by the contract of employment.

(b) *Legislation:*

A range of statutes and statutory instruments confer a number of minimum statutory rights on employees, one of the most important of these being the Employment Rights Act 1996 (ERA) which provides, amongst many other rights, a right not to be unfairly dismissed. The Equality Act 2010 (EqA) deals with discrimination law and the Working Time Regulations 1998 (WTR) sets out minimum requirements in terms of maximum working hours, providing holiday, rest breaks, etc.

(c) *European law:*

Employees have acquired additional rights (and employers have acquired additional obligations) as a result of European law, particularly in the areas of discrimination, equal pay and 'family-friendly' rights.

2. CONTRACTS OF EMPLOYMENT

2.1. OVERVIEW

A contract of employment need not be in writing and may be partly written and partly oral. Although oral contracts are legally enforceable, it is always

better to have a written contract as evidence of the terms that have been agreed between the parties.

A contract of employment will generally consist of:

- (a) Express terms, which are those that have been specifically agreed between the parties, whether in writing or orally;
- (b) Implied terms, which are those that are taken to have been agreed, because:
 - they are too obvious to need recording;
 - they are part of the custom and practice of the business or industry;
 - they can be logically deduced from the conduct of the parties;
 - they are necessary to give ‘business efficacy’ to the agreement as a whole;
- (c) statutory terms those derived from employment legislation;
- (d) terms incorporated into individual contracts from other sources, such as collective agreements.

The terms of employment may be found in one document or a combination of documents, including a staff handbook.

2.2. WRITTEN EMPLOYMENT CONTRACTS

Employees who have been employed for one month or more are entitled by section 1 ERA to a written statement of particulars of employment. The written particulars must be provided to employees within two months of starting employment. This document should contain all of terms relating to the following:

- the scale or rate of pay;
- the intervals at which the employee is to be paid (i.e., weekly, monthly or other specified intervals);
- hours of work;
- entitlement to holidays and holiday pay;
- incapacity for work due to sickness or injury, including any provision for sick pay;
- pensions and pension schemes;
- the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment;
- the title of the job which the employee is employed to do or a brief description of the work for which he is employed;
- where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

- either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer;
- any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made;
- where the employee is required to work outside the United Kingdom for a period of more than one month, the period for which he is to work outside the United Kingdom and the currency in which remuneration is to be paid while he is working outside the United Kingdom;
- any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom.

Subject to the above, there is no legal requirement for other contractual terms to be in writing – they may be either written or oral or even a mixture of the two.

If an employer fails to provide a section 1 ERA statement or provides an inaccurate or incomplete statement, an employee may make a claim to the employment tribunal for compensation of up to four weeks' pay.

Unless an employment contract specifically provides for a power to vary, an employer will only be able to change terms of employment with the consent of the employee. If the employee does not consent, an employer has two choices: vary it unlawfully and risk the employee suing for breach of contract; or terminate the old contract and replace it with a new contract on the new terms, with the risk that an employee may claim to have been unfairly dismissed.

2.3. ORAL CONTRACTS

Although technically in breach of section 1 ERA, which requires the main terms of a contract to be provided in writing to the employee, oral contracts are as binding as written contracts. However the inevitable problem with an oral contract is that it may be difficult to prove the exact terms and conditions of the employment. If there is only an oral contract, otherwise extraneous matters, such as job advertisements and representations made at an interview, will have increased significance. The courts have indicated their willingness to use the wording contained in advertisements to interpret ambiguous terms in an oral contract. For all these reasons, it is advisable for employment contracts to be in writing in case of a later dispute regarding the agreed terms.

2.4. EMPLOYEE HANDBOOKS

It is normal practice for employers to issue employees with a staff handbook. Commonly a staff handbook contains all the non-contractual policies and procedures that are applicable to the employment. The benefit of ensuring that the handbook is non-contractual is so that it can be amended and updated without obtaining the consent of the employees. Occasionally, however, some employers opt to have a contract of employment which is a combination of certain terms set out in a staff handbook together with those terms set out in the individual contract issued to the employee.

2.5. JOB DESCRIPTION

There is no obligation to provide an employee with a job description, but an employee's written statement of employment must include the title of the job that the employee is employed to do or a brief description of the work for which s/he is employed.

2.6. OFFER LETTERS

An employer needs to consider whether an offer letter will form part or all of the contractual terms (once accepted by the employee) or whether the employer intends to have a separate more detailed contract of employment that the employee will sign when they start work. If the offer letter is to comprise the entire contract then it is important to check that the offer letter contains all the relevant terms of employment and expressly incorporates any other documents that may contain contractual terms, for example, a staff handbook.

If the offer letter is to be superseded by a more detailed written contract of employment once the employee starts work, then the employer may wish to make the offer of employment conditional upon the signing of the full contract and acceptance of its terms (in other words mark the offer letter 'subject to contract'). This will prevent an employee from arguing that the employer is unilaterally trying to change the terms agreed in their offer letter.

A common problem occurs where the terms of the offer letter and the terms of the subsequent contract of employment are inconsistent. The contract should make it clear that in the event of any inconsistency, it is the contract terms that will prevail. It may also be useful to include an 'entire agreement' clause in the offer letter and/or contract which records that the document contains the entire agreement as to the employee's terms of employment (if this is the case) as this will prevent an employee

subsequently arguing that they are entitled to contractual terms other than those set out in the offer letter or contract. For the same reason, it may be advisable to include a provision in the offer letter or contract stating that the employee has not relied on any oral or written representations which are not contained in the offer letter or contract, to head off a misrepresentation claim that, for example, they were promised a particular promotion at interview and that was the reason they accepted the offer of employment.

The employer needs to consider whether the offer of employment should contain any conditions precedent. If these are required they must be clearly set out in the offer letter. Common conditions include:

- the need to obtain an appropriate work permit;
- immigration approval for an employee who does not have permission to work in the UK;
- receipt of references or background checks which are satisfactory to the employer;
- receipt of regulatory or other relevant professional body approval;
- obtaining any qualifications specifically required for the job.

2.7. CHECKLIST OF DO'S AND DON'TS

- Ensure that all employees sign a contract of employment, or at the very least, a basic written statement of terms and conditions that complies with section 1 ERA. Such document should ideally be issued at the start of employment but no later than two months after employment starts.
- Consider including specific terms in the contract of employment that provide some protection against the disclosure of confidential information, poaching clients after the employment has ended, etc.
- Include in an offer letter a number of conditions precedent relating to references, qualifications, right to work in the UK, etc.
- Even if there is no staff handbook in place, ensure that certain procedures, such as disciplinary, grievance and equal opportunities policies and procedures are drafted and made accessible to employees.
- When writing an offer letter, employers should consider what they want to achieve, whether it will form part of the contract of employment or whether a contract will follow, in which case special care will need to be taken to ensure that there are no inconsistencies between the contract and the offer letter.