

# **Contract Of Employment**

## **The Contract Of Employment Explained**

Labour law is based on the concept of a contract of employment between an employer and an employee. The Industrial Relations Act 1990, says that this contract may be ‘expressed or implied, oral or in writing’. The Terms of Employment (Information) Acts, 1994-2001, give most employees the right to a written statement of certain particulars of their terms of employment. Similarly, the Unfair Dismissals Acts, 1977, give employees a right to written grievance and disciplinary procedures.

That said, it can be very difficult to be certain as to the full extent and content of an employment contract, not least because it is a description of a relationship that is human, dynamic and – certainly in today’s world – subject to constant change. Contracts of employment are thus subject to uncertainty and variability.

### ***Do All Employees Actually Have A Contract Of Employment?***

Yes. Every employee has a contract of employment. It might be written down in a formal document, a letter of appointment or a company-union handbook or agreement. Equally, it might merely be an oral agreement between the employee and the employer. In most cases, a contract of employment is probably a mixture of all these elements.

Sometimes employees are heard to say, ‘I have no contract of employment’. What they really mean is that they have no written contract of employment. Such a statement might also mean that their employer was in breach of the Terms of Employment (Information) Acts, 1994-2001.

### ***How Is A Contract Of Employment Established?***

A contract of employment is established when an offer is made by an employer and accepted by an employee.

For the contract to be valid –

- there must be an offer and an acceptance;
- there must be some consideration or remuneration for the work done - anyone who works for a regular wage or salary thus has a contract of employment;
- it must be lawful in its purpose;
- and there must be an intention to create a legal relationship.

The contract of employment may be either –

- for the provision of ongoing employment – this contract is terminable only by agreed notice being given by either party, resignation, dismissal, redundancy or retirement;
- for a fixed-term – say a six-month contract;
- for a specified purpose – until, for example, a construction job is completed.

## What Terms Make Up A Contract Of Employment?

The contract of employment is considered to involve *express terms*, *implied terms* and *incorporated terms*. The relationship between these various terms is shown in Figure 1.

**Express terms** are those terms which have been explicitly agreed between the employer and employee in a verbal or written agreement. This might include detail as to the nature of the job, the wages and hours of work, whether there is a sick pay scheme or pension.

**Implied terms** derive from common law and place a set of duties on both employer and employee and are implicit in every contract of employment. For example, the right to natural justice and the employer's duty of care are implied terms in any contract of employment.

**Incorporated Terms** are those terms that are automatically incorporated into an employee's contract of employment from sources such as –

- collectively bargained agreements;
- national agreements;
- or statutory requirements.

The contract of employment relationship is considered to be an individual one between an employer and an employee but much of that relationship is determined through collective bargaining. An employee might have voted against a new proposal within the collective agreement but if the majority voted in favour, the new agreement will be implemented and the terms automatically incorporated into the employee's contract. The pay and terms of employment elements of National Wage or Partnership Agreements, once accepted by the Social Partners, are incorporated into an employee's contract. An Act, once it enters the statute book and the terms cover a particular employee, is also incorporated into the employee's contract.

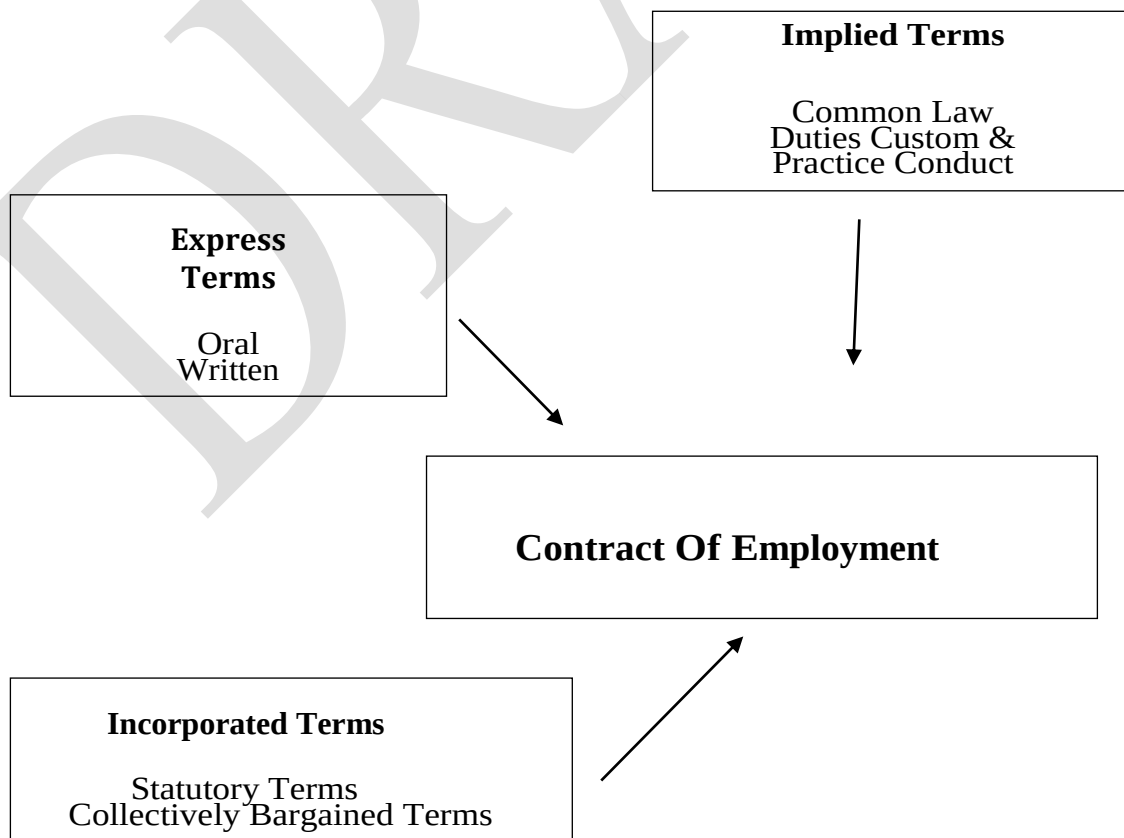


Figure 1: Contract Of Employment.

***The common law duties owed by employees to their employer are –***

- ***to make them-self available for work*** or, in other words, to turn up for work. Lengthy periods of absence, even for quite genuine reasons such as sickness or injury, may lead to the *frustration of the contract* and an employer may seek to argue that the contract could be terminated;
- ***to obey reasonable and lawful orders*** or to demonstrate obedience. Orders that might be challenged are those that could be considered illegal, unreasonable, unsafe or immoral. Employees challenging an order on such grounds sometimes *work under protest* until such times as either a Shop Steward or Safety Representative can be brought to the scene to settle matters in dispute;
- ***to give faithful and honest service*** obliges an employee to keep industrial or trade secrets or confidentialities, to not clock someone else's card or falsify any work performance or test sheets. Ideas or inventions discovered on company time may well be the intellectual property of that employer. An employer could be entitled to exclusive service from the employee. It also suggests that an employer can expect competent performance of duties from the employee;
- ***to exercise care to yourself and fellow employee*** means following safety guidelines and wearing the appropriate personal protective equipment. It also means that horseplay or other dangerous practices should be avoided.

***The common law duties owed by an employer to their employees are –***

- ***to pay wages*** - those wages that have been agreed between the parties. Employees covered by the National Minimum Wage Act, 2000, are entitled to the basic wage level stated by that Act and some workers may have an entitlement to a minimum rate because they are covered by an Employment Regulation Order, a Registered Employment Agreement, a Sectoral Employment Order or a Collective Agreement;
- ***to provide work (sometimes)*** means that an employer may have to provide sufficient volume of work to allow an employee guaranteed a certain wage to achieve that level of payments are piece-related. Similarly, an employee employed because of a particular skill may have to have work provided that allows them maintain or develop that skill;
- ***to indemnify employees against all costs, expenses and claims against the employee arising from the employee's duties*** or, in other words, it is the employer not the employee that might be sued for damages arising from the work – sometimes known as vicarious liability;
- ***to exercise care*** is a prime obligation on all employers and is known as the ***duty of care***.

This *duty of care* can be summarised as an obligation on employers to provide

- *a safe place of work;*
- *a safe system of work;*
- *safe plant and machinery;*
- *competent fellow employees.*

The Safety, Health & Welfare At Work Act, 1989 - 2005, and attendant regulations, give wide statutory interpretation to these elements.

### ***Is Custom And Practice An Implied Term?***

Yes. *Custom and practice* is recognised, almost uniquely, in contracts of employment as having the capacity, through the behaviour of either party to the contract, to vary or change the terms of that contract. In other words, how things have always been done - rather than how things should be done according to the written contract – may take precedence in interpreting which action is legitimate under that contract. The classic example of a custom and practice is a tea break. Such breaks may either not be provided for at all in a contract or, if they are provided for, are supposed to take only ten minutes. In reality there could be a tea break that no one has ever challenged and it takes fifteen to twenty minutes.

### ***How Is Something Established Through Custom & Practice?***

This can be a matter of dispute. To be recognised in law, however, a custom and practice must be **reasonable, certain and notorious**. The tea break example may be **reasonable** because all employments have morning breaks or the time over the ten minutes provided for is explained by the distance from workbench to canteen, queues in the toilets or canteen, and time to get back to workstations. **Certain** means that the custom and practice is always the same thing – it is always a morning tea break or the extra time is five to ten minutes not whatever the workforce can get away with. **Notorious** means that the custom and practice is both known to management and has been tolerated or accepted by them. The tea break has never been challenged and indeed supervisory and line management avail of it themselves or the extra time is not challenged and employees are only chivvied after fifteen or twenty minutes to return to work.

Something employees have always done but without management's knowledge – for example illicit smoking or sneaking off early – can never be established as a custom and practice because it does not obey the reasonable, certain and notorious tests.

### ***Conduct***

An employee's own **conduct** may lead to custom and practice variation in the contract. Caution is needed, therefore, if an employee is requested to do something that they feel is outside their terms of contract or normal job. In these circumstances, the employee may agree **under protest** so that it is clear that the authority of the order giver is not challenged but the content of an order is. In trade union organised employments, such working under protest will illicit immediate investigation between employer and Shop Steward to resolve matters.

### ***Incorporation of Equal Treatment & Equal Pay Terms Of Employment***

One impact of incorporated statutory terms is that, for all workers since 1998, the Employment Equality Act states that implicit in every contract of employment is a term entitling workers to equal treatment and equal pay.

### ***Are Contracts Of Employment Subject To Variability, Change & Uncertainty?***

Yes. Unlike other forms of contract, contracts of employment can be subject to variability, change and uncertainty. Terms once expressed quite clearly and specifically, might now have been altered considerably by custom and practice, disputes that were settled through collectively bargained procedures including Labour Court Recommendations/Decisions, or by the adoption of a new National Agreement or local agreement, or by the introduction of a new piece of employment law.

***This is why it is vital that workplace Union Representatives immediately document all changes in the contract of employment when they agreed, whether that agreement is a verbal understanding or a formal,***

*written document. A copy of any change should be given to the Union Organiser/Official dealing with the employment concerned.*

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