

Briefing Note: 10 Myths about Employment Law

An Introduction to the Guide

The ten most common misconceptions encountered by the Head of Gaby Hardwicke's employment team. This guide should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

1. My staff don't have contracts of employment.

This is not strictly correct. Anyone who is employed has a contract of employment. It may be that you do not have formal written contracts, but a contract is nothing more than a legal agreement, the terms of which can be written or oral, express or implied. They can come from an offer letter, a staff handbook or even from something said at interview or put in the advert (see Hawker Siddeley Power Engineering Ltd -v- Rump).

2. I don't need to have written contracts.

Every employee has the right to written particulars of employment within 2 months of commencing employment. What must be included is set out below. Prior to 1 October 2004 the only consequence was that any employee could apply to an Employment Tribunal during employment or within 3 months of it ending and the Tribunal could decide for you what your terms were - which could often be quite draconian, especially in respect of notice period or contractual sick pay. Since 1 October 2004 in addition you will also be ordered to compensate employees up to a month's gross pay.

The following particulars must be included in written particulars of employment: -

Names of the employer and employee.

Date when employment began.

The date when any period of continuous period of employment began.

The scale or rate of remuneration or method of calculation.

Intervals at which remuneration is paid.

Terms and conditions relating to hours of work, including overtime.

Terms and conditions relating to holidays, including public holidays, holiday pay and accrued holiday pay upon termination.

Terms and conditions relating to incapacity for work due to sickness or injury including sick pay.

Terms and conditions relating to pensions.

Length of notice.

Job Title or brief job description.

Briefing Note
May 2008

Summary:

The ten most common misconceptions encountered by the Head of Gaby Hardwicke's employment team

Author: Paul Maynard

For detailed advice on all employment law matters please contact:

Paul Maynard
Partner

01323 435900
pcm@gabyhardwicke.co.uk

Briefing Note: 10 Myths about Employment Law

Duration of employment if not intended to be permanent.

Place of employment or an indication that the employee may be mobile.

Details of any collective agreements.

Details of any work outside the UK.

Details of any disciplinary rules.

Details of any person an employee can appeal to under the disciplinary rules.

Details of any grievance procedure.

NB. An employer with fewer than 20 employees is currently exempt from the need to have disciplinary rules or the need to identify a person the employee can appeal to under those rules.

3. I can do it because the contract says so.

As mentioned before a contract is made up of both express and implied terms. Some terms are implied because it is obvious that is what the parties intended, even though they did not expressly state it. Other terms are implied by law. The most common is that of mutual trust and confidence. It is implied that neither party will behave in such a way as to damage or destroy mutual trust and confidence. This is so, regardless of what the contract expressly states.

See e.g. United Bank –v- Akhtar Clark –v- Nomura International

4. He's employed on a fixed term contract so he has no employment rights.

The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 came into force on 1 October 2002 and made it unlawful to treat a fixed term employee less favourably than a permanent employee. So it would be unlawful to pay them less simply because they are on a fixed term contract - but the big change is that it means that you must treat them the same as permanent staff when it comes to dismissing them - e.g. in a redundancy situation it would be unfair to select the fixed term employees ahead of their permanent counterparts. The other effect of the Regulations is to convert consecutive fixed term contracts, that have been running for 4 years or more into a permanent contract, even if there have been small gaps in between them, such as for summer holidays.

5. He works for an agency - not me.

A similar point to the above. Agency workers are traditionally engaged by a recruitment agency and supplied to end user clients. In the past short term low skilled workers have normally been used by agencies (temps) but in recent years the trend has been to use longer term higher skilled staff, especially in the IT industry. The purpose of these arrangements is often to avoid the worker having "employee status" and therefore unfair dismissal protection and the right to a redundancy payment. That seems set to change in light of Dacas -v- Brook Street Bureau, where the Court of Appeal has found as a matter of policy that the end user will be the employer where the engagement has lasted for at least 12 months.

6 The bank staff in my care home do not have employment rights

That was previously believed to have been the case because of the absence of mutual obligations to offer work and for the work to be done. That has been called into question in the case of Cornwall County Council v Prater (2006) which concerned a home tutor who could accept assignments when they were offered but was

Briefing Note: 10 Myths about Employment Law

not obliged to do so. The court ruled that when she accepted an assignment there was a sufficient degree of obligation to render her an employee. Moreover, gaps between assignments were disregarded for the purpose of calculating continuous service. This case is indistinguishable from that of bank staff operating in the NHS or the private care sector. The message for Employers from the two cases above is that they should think carefully before disregarding the rights of those they do not initially consider to be employees.

7 Flexible Working - means a right to go part time.

There are two things wrong with this statement. We are dealing with the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 which came into force in April 2003. The right applies to any employee with a child under 6 (18 if disabled). Flexible Working is not just confined to part time working. It applies to any terms relating to hours of work, time of work or where the work is performed - e.g. home working. It is also a right to request flexible working not a right to actually have it. That being said, it may only be turned down on certain statutory grounds, e.g. cost to the business, inability to organise staff.

8 The new statutory procedures only apply when you intend to sack someone for misconduct.

Hopefully many of you will know that some of the furthest reaching changes to employment law came into force on 1 October 2004. They introduce mandatory dismissal and disciplinary procedures. These require that you hold a meeting at which the employee has the right to be accompanied and to state his or her case; that the employee is given written notice of the issues to be discussed at the meeting; that the outcome is confirmed in writing and that the employee is given the right to appeal. If you fail to comply, any dismissal that results is automatically unfair and compensation will be increased by at least 10% and up to 50%. The important point though is that it applies to any dismissal not just to disciplinary dismissals and so will apply to redundancies and any failure to renew a fixed term contract.

9 You can unfairly dismiss someone, provided they have less than 12 months service.

It is generally the case, but there are some very important exceptions that you need to ensure do not apply before dismissing someone with less than 12 months service:-

- a. It must not be discriminatory; i.e. not for a reason related to race, sex, disability, religious belief, sexual orientation and in 2006 age.
- b. It must not be connected with the employee raising a health and safety concern or Whistleblowing.
- c. It must not be connected with the employee exercising a statutory right, e.g. flexible working or for trade union reasons.

In each of the above the qualifying period will not apply.

10 You always have to pay someone's full notice pay when you dismiss them.

No, payment in lieu of notice is a compensatory payment for breaching the employee's contract. You are therefore compensating them for their loss. If they walk into equivalent employment on the Monday, having been sacked on the Friday, there will be nothing to compensate for. Also the employee must mitigate his loss and if he unreasonably fails to look for employment during his notice period you may also be able to avoid paying him during that time.

Please bear in mind the above is a brief guide to a number of complex issues. We are trying to flag issues up for you but a little knowledge can be a dangerous thing! In all cases we recommend that you contact us to talk through the issues.

Briefing Note: 10 Myths about Employment Law

If you would like to know more about this topic or our other legal services, please contact:

Gaby Hardwicke
33 The Avenue
Eastbourne
East Sussex
BN21 3YD

Tel: 01323 435900
Fax: 01323 435901
info@gabyhardwicke.co.uk
www.gabyhardwicke.co.uk