



Employment Legislation The Contract of Employment

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Principal topics

- The employment relationship
- Contracts of Employment
- Dismissal Procedures

Employment Relationship

- Who is an employee?
- Why is it important?

Consequences of classification

- What are the consequences of classifying someone as an employee?

Consequences

The way in which tax and PRSI is payable to the Collector-General. An employee will have tax and PRSI deducted from his or her income. A self-employed person is obliged to pay preliminary tax and file income tax returns whether or not he or she is asked for them

Consequences

- Entitlement to a number of social welfare benefits, such as unemployment and disability benefits. An employee will be entitled to unemployment, disability and invalidity benefits, whereas a self-employed person will not have these entitlements

Consequences

- Other rights and entitlements, for example, under Employment Legislation. An employee will have rights in respect of working hours, holidays, maternity / parental leave, protection from unfair dismissal etc. A self-employed person will not have these rights and protection.

Employee tests

- Control Test
- Organisational/integration test
- Entrepreneurial Test.
- Elephant test

Control test

- Can the employer tell the worker what to do, when to do it and how to do it?
- What about skilled posts e.g. surgeon?

Organisational/Integration test

- Is the worker an integral part of the employer's business?

Entrepreneurial Test

- Is the worker his own boss? Does he provide his own equipment? Does he hire helpers? Has he any financial risk?

Elephant test

- Difficult to describe but you know it when you see it

Employment Status Group

- set up under the Programme for Prosperity and Fairness (PPF).
- *"The Office of the Revenue Commissioners and the Department of Social, Community & Family Affairs, in consultation with the Social Partners, will seek a uniform definition of 'employee' based on clear criteria, which will determine the employment status of an individual".*

Indicators for an employee

While all of the following factors may not apply, an individual would normally be an employee if he or she:

- Is under the control of another person who directs as to how, when and where the work is to be carried out
- Supplies labour only
- Receives a fixed hourly/weekly/monthly wage
- Cannot sub-contract the work. If the work can be subcontracted and paid on by the person subcontracting the work, the employer/employee relationship may simply be transferred on.

Indicators (continued)

- Does not supply materials for the job
- Does not provide equipment other than the small tools of the trade.
- Is not exposed to personal financial risk in carrying out the work
- Does not assume any responsibility for investment and management in the business

Indicators (continued)

- Does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements
- Works set hours or a given number of hours per week or month
- Works for one person or for one business
- Receives expense payments to cover subsistence and/or travel expenses
- Is entitled to extra pay or time off for overtime.

Additional factors to be considered

- An individual could have considerable freedom and independence in carrying out work and still remain an employee
- An employee with specialist knowledge may not be directed as to how the work is carried out
- An individual who is paid by commission, by share, or by piecework, or in some other atypical fashion may still be regarded as an employee
- Some employees work for more than one employer at the same time.
- Some employees do not work on the employer's premises
- There are special PRSI rules for the employment of family members

Employee status

- What if the contract says you are not an employee?

Employee status

- *"You are deemed to be an independent contractor",*
- *" It shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise",*
- *"It is agreed that the provisions of the Unfair Dismissals Act 1977 shall not apply etc" ,*
- *"You will not be an employee of this company",*
- *"You will be responsible for your own tax affairs"*

Employee Status

- “While they may express an opinion of the contacting parties they are of minimal value in coming to a conclusion as to the work status of the person engaged”.
(according to the Employment Status group)

Indicators of Self-employed

- Owns his or her own business
- Is exposed to financial risk, by having to bear the cost of making good faulty or substandard work carried out under the contract
- Assumes responsibility for investment and management in the enterprise
- Has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks
- Has control over what is done, how it is done, when and where it is done and whether he or she does it personally

Indicators (continued)

- Is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken
- Can provide the same services to more than one person or business at the same time
- Provides the materials for the job
- Provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account

Indicators (continued)

- Has a fixed place of business where materials equipment etc. can be stored
- Costs and agrees a price for the job
- Provides his or her own insurance cover e.g. public liability etc.
- Controls the hours of work in fulfilling the job obligations
- ese rights and protection.

Contracts Generally

- What is a contract?

Contracts

- Offer
- Acceptance
- Consideration

Contracts

- Cannot be for an illegal purpose
- Cannot exclude legal entitlements e.g. Constitutional protection

Contracts

- Implied Terms (Common Law and Statute)
- Express Terms

Implied Terms (common law)

- Note: A court will only imply terms if it decides that it is something that the parties would not only have wanted but would almost certainly have agreed on at the time of contract. Will not be used to overrule express terms.

Implied Terms (common law)

- Must an employer give an employee work?

Implied Terms (common law)

- Collier v Sunday Referee Publishing Co. Ltd. [1940] 2 KB 647. No.
- However, if an employee has a high level of skill and needs to work to maintain that skill he/she may have an entitlement
- Piece work – entitled to be given work

Implied Terms (common law)

- Duty to obey reasonable and lawful commands.
- Must not contravene law and must be within the contract.

Implied Terms (common law)

- **Sickness.** Common law implies a term that wages would continue to be paid for the duration of any period of sickness unless the contract was terminated with notice.
- **Note.** This only applies if the contract is silent on the issue. Therefore you can state expressly that no sick pay will be given.

Implied Terms (common law)

- Duty of Fidelity. Not to compete, Not to divulge confidential information and rules relating to inventions by employees.
- Duty of employer to ensure safety.
(Reasonable care)
- Duty to treat employee with respect.

Other Implied Terms

- Collective agreements
- Custom and practice

Implied terms (statutory)

- Hours of work (Working Time Act)
- Holidays
- Parental Leave
- Pay
- Insolvency
- Equal pay and opportunities
- Dismissal
- Redundancy
- Transfer of Undertakings
- Part-time Workers
- Fixed-term Workers
- Minimum Notice and terms of Employment
- Health and Safety

Express terms

- Must be within the law.
- Usually used to describe entitlements and duties.
- Can be used to avoid implied terms at common law.

Examples of Express terms

- Probation
- Expenses/company car
- Right to Search
- Trade union membership
- Retirement age
- Confidentiality
- Competition
- Medical clearance
- Smoking

Terms of Employment

- Minimum Notice and Terms of Employment Acts
- Must give in writing to new employees
- Must give in writing to existing employees on request

Terms of Employment

- Note: Contract of service (not for service)
- Full names of the employer and employee
- Address of the employer
- Place of work or where there is no fixed or main place of work, a statement that the employee is required or permitted to work at various locations
- Job title or nature of work

Terms of Employment

- Commencement date of the employees contract of employment
- Duration of a temporary contract or the date on which a fixed-term contract is due to expire
- Rate of method of calculation of the employee's remuneration
- Payment intervals e.g. weekly, monthly etc.
- Hours of work (including overtime)
- Holidays and other paid leave

Terms of Employment

- Sick leave arrangements and pension scheme provisions (only if applicable)
- Notice requirements
- Reference to any collective agreements
- Details of rest periods and breaks

Terms of Employment

- Details of any collective agreement which directly affects an employee's terms and conditions.
- The statement must be signed by or on behalf of the employer.
- You may refer to other documents e.g. employee's handbook.

Changes to contract

- Must notify employee within one month of changes to terms.
- Must keep copy of statement for duration of employee's employment and one year thereafter

Different Types of Contract

- Fixed term
- Specified purpose
- Contract for services

Different types of contract

- Fixed Term. Should include start and finishing date. Contract should include a paragraph stating;
- I have read the Particulars and Conditions of employment outlined above, and I agree to accept employment in accordance with same. I understand and accept that, as my employment is for a fixed term, the Unfair Dismissals Act 1977 will not apply to the termination of this employment consisting only of the expiry of the term of employment

Different types of contract

- Specified purpose. For example, until a building is finished. Should include a similar clause

Different types of contract

- Contract For services. Agree a price with a tradesman to do specified work for you. For example, if you need a plumber.

Termination of Employment

- At Common Law
- Dismissal Procedures
- Unfair Dismissal

Common Law

- By Agreement
- Frustration
- Repudiation
- Dismissal

Common Law

- By Agreement. For example, where an employee voluntarily resigns. A second example would be at the end of a fixed term contract. (This is classified as a dismissal)

Common Law

- Frustration. Where performance of the contract becomes impossible e.g. on the death of one of the parties or where performance of the contract would be illegal.
- Note, hardship or inconvenience is not sufficient

Common Law

- Repudiation.
- This is where one of the parties has breached or threatens to breach one of the fundamental terms. The other party – the ‘innocent’ party – is entitled to treat the contract as ended.
- Note. If he/she does not accept the repudiation the contract remains in existence

Types of Dismissal in Common Law

- Summary Dismissal
- Lawful Dismissal
- Wrongful Dismissal

Summary Dismissal

- Means dismissal without notice. Where;
- Gross misconduct
- Refusal to obey lawful and reasonable order
- Gross neglect
- Dishonesty
- Note: only accepted by courts in extreme circumstances and based on today's values.

Lawful Dismissal

- Where the employer is entitled to dismiss with notice.
- Note. You can give pay in lieu of notice
- If he works the period of notice the dismissal is effective from last day.

Wrongful Dismissal

- **If the employer dismisses the employee without the legal right to do so this will be 'wrongful' at common law.**
- **Usual remedy will be damages for breach of contract. Level will be determined by appropriate court.**
- **Rarely reinstated/reengaged**
- **Six years**
- **If common law option is pursued then you cannot pursue statutory remedy.**

Dismissal and Statute Law - Fair and Unfair Dismissal

- Unfair Dismissal Acts 1977-93
- Has Dismissal occurred?
- Onus is on Employee to prove that it has.
- Dismissal is presumed to be unfair.
- Onus on Employer to prove that it was fair.

Who Decides?

- Common law – courts
- Statute – Rights Commissioner or Employment Appeals Tribunal

Unfair grounds

Some dismissals are specified as automatically unfair. For example;

- Trade union membership or activities
- Pregnancy
- Religious beliefs
- Sexual orientation

This means that a dismissal on these grounds can never be fair no matter how reasonable it may have appeared to the employer.

Fair grounds

As well as listing unfair grounds the Act also lists a number of justifiable grounds

1. Conduct
2. Incapacity: capability, competence, qualifications
3. illegality
4. Redundancy
5. Other substantial grounds

Conduct

- **Note: Act says conduct not misconduct.**
- **This allows for 'last straw' cases.**
- **Overriding test is 'reasonableness'**

Incapacity: capability, competence and qualifications

- **Capability.** Usually refers to physical or mental ability to do job

Incapacity: capability, competence and qualifications

Competence.

- Most difficult to justify – highly subjective
- Against what standard?
- Were there other factors influencing performance outside his/her control?
- Could training have helped?
- Was time and opportunity given to improve?

Note: If using this reason warnings must be clear and there must be no contradictory signals e.g. fulsome praise.

Incapacity: capability, competence and qualifications

Qualifications

- If employee does not have the necessary qualifications the dismissal may not be unfair.
- Note: qualifications will need to be necessary.

illegality

- Where the continued employment is impossible without contravention by either the employer or the employee of a duty imposed by a statute or statutory instrument

Redundancy

- A technical defence
- Only issue is whether a redundancy situation existed as defined by the Redundancy Payments Acts 67-71
- Note: Employment Appeals Tribunal is wary of this defence as it has been common for 'redundancy' to be used to disguise the real reason.

Other substantial grounds

- Can't predefine
- Example 'Flynn' case.
- Must be substantial.

Constructive Dismissal

- Where the employer's actions were such as rendered it reasonable for the employee to terminate the contract without notice.

Note: onus on employee to prove that dismissal occurred

Remedies

- Re-instatement
- Re-engagement
- Compensation

Note: The tribunal decides which remedy

Re-instatement

As though the employee had never left.
Same post, full arrears.

Re-engagement

- Same job from current date. Usual if employee is deemed partly to blame. Not full arrears
- Tribunal may direct in relation to break of service etc.

Compensation

- Maximum of 104 weeks gross remuneration.
- Remuneration includes, pay allowances, bonuses, bik and even employer's contributions to pension.
- May be partially reduced if employee partly to blame or failed to mitigate his loss.

Disciplinary Procedures

- Fact. In 95% of cases in which a dismissal is found to have been unfair the tribunal has held that proper procedures were not followed.
- If you have a procedure this should be referred to in the contract.
- If you have no documented procedures the tribunal will decide appropriate procedures which should have been followed. These include the principles of Natural Law, and the Code of Practice produced by the Labour Relations Commission

Procedures

A Disciplinary procedure must comply with Constitutional/Natural law. Provision must be made for;

- Details of the allegations should be put to the employee concerned.
- The employee concerned must have the opportunity to respond. This generally includes the right to question witnesses
- The employee has a right to representation
- A fair and impartial determination, including a right of appeal.
- The punishment must fit the crime

Code of Practice

- An attempt should be made if possible to informally resolve the issue at local level.

Note: This depends on the seriousness of the issue

- Procedures should be written and understandable

Note: Employees should be made aware of what behaviour is unacceptable

Code of practice

- Proper written records should be maintained
- Warnings should be removed after a specified period of time
- An employee may be suspended pending investigation.

Disciplinary Action

- Oral warning
- Written warning
- Final written warning
- Suspension (with or without pay)
- Transfer
- Demotion
- Other action short of dismissal
- Dismissal

Disciplinary Action

Note:

- Steps should normally be progressive
- Steps may be 'accelerated' depending on the offence.

Summary

- Who is an employee?
- The contract of employment
- Dismissal