



Members' guide

# Personal contracts of employment



# Contents

<b>Personal contracts – your legal rights</b>	<b>1</b>	<b>8 Restrictive clauses</b>	<b>16</b>
<b>1 What is a personal contract?</b>	<b>2</b>	During employment	16
Union recognition	2	After employment	16
Inducement to give up collective bargaining	2	<b>9 Statutory employment rights</b>	<b>18</b>
<b>2 Your contract of employment</b>	<b>3</b>	Statutory employment rights	18
Evidence of the contract	3	Enhanced contractual rights	19
Written statement of terms and conditions	3	Continuity of employment	19
<b>3 Employment status</b>	<b>5</b>	Whistleblowing	19
Employees	5	Information and consultation	20
Workers	5	Legal action	20
Zero hours contracts	5	<b>10 Equality at work</b>	<b>21</b>
<b>4 Terms and conditions</b>	<b>7</b>	Pay secrecy clauses	21
Identity of employer	7	Gender pay gap	21
Job description and duties	7	Types of discrimination	21
Hours	7	<b>11 Fixed-term/temporary contracts</b>	<b>23</b>
Fixed-term contracts	8	Fixed-term contracts	23
Mobility clauses	8	Equal treatment	23
Pay issues	8	Limits on fixed-term contracts	23
Expenses	9	Casual recruits	23
Notice of termination of employment	9	<b>12 Changes to the contract</b>	<b>25</b>
Termination clauses	9	Variation of contract	25
Pensions	9	Flexibility clauses	26
Redundancy	10	<b>13 How to negotiate changes</b>	<b>27</b>
<b>5 Intellectual property rights</b>	<b>11</b>	<b>14 Contract checklist</b>	<b>28</b>
Ownership of IPR	11	Agreeing a contract	28
Payments to employees	11	New contract for the same employer	28
<b>6 Grievance and disciplinary procedures</b>	<b>13</b>	Other points	28
The right to be accompanied	13		
<b>7 Non-pay benefits</b>	<b>14</b>		
Company cars	14		
Employee shares and share options	15		
Other benefits	15		
Flexible benefits packages	15		
Training	15		

# Personal contracts – your legal rights

A number of Prospect members are on personal contracts. Some of them are happy with this or have no choice. Others would like to be covered by collectively agreed terms.

Whatever your view, Prospect is committed to making sure you have all the information you need to get the best terms possible at work.

The use of individual or personal contracts which take employees outside collective bargaining has increased. Personal contracts can weaken an individual's bargaining position and reduce the collective strength of workers. If individual employment rights are eroded, the negotiating position of all staff is weakened.

This guide explains the legal rights and practical issues surrounding contracts, gives advice on how to negotiate your own contract and points out the pitfalls to avoid. It is relevant to members in both the private and public sectors.

The guide is applicable to new members joining on a personal contract, or existing employees who are promoted or transferred to a personal contract. Any member offered a personal contract can ask Prospect to check it before they agree or sign it.

The guide gives an overview of the position. It does not cover all the legal aspects of your contract and rights at work. For more detailed advice, please contact:

- your local Prospect representative
- the full-time officer for your workplace/branch
- our Member Contact Centre.

**Please note: legal advice and assistance is offered at the discretion of Prospect and will be decided on an individual basis depending on the facts and merits of the case.**

# 1. What is a personal contract?

**1.1** A personal contract is not subject to collective bargaining. Terms and conditions of employment, especially pay, are individually agreed without being collectively negotiated. The contract can be tailored by the employer so that employees have different terms of employment, benefits or pay arrangements to their colleagues.

**1.2** Pay is often the only truly personal element, and even that is not always the case. Personal contracts within an organisation or a group of workers are often fairly standard.

**1.3** Legally, all contracts of employment are individual, as the means of enforcing any contract is down to the individual employee and employer. Staff on personal contracts have the same statutory employment rights as other employees.

**1.4** People on personal contracts can still belong to their trade union and have as much need for union assistance as other members with collectively agreed terms.

## **Union recognition**

**1.5** There is a statutory right for unions to seek recognition for collective bargaining over pay, hours and holidays on behalf of their members. This can apply where there are 21 or more employees employed in the

company or organisation. Recognition will be granted where either 50% of the workforce are union members or where there is a ballot for union recognition and a majority of those voting, and at least 40% of the bargaining unit, vote in favour. Where union membership is high, this will be a way to enforce collective bargaining.

## **Inducement to give up collective bargaining**

**1.6** Employers are prohibited from offering workers inducements for the sole or main purpose of avoiding collectively agreed terms. If you are on collective terms and the employer tries to persuade you onto a personal contract, this may be unlawful so contact Prospect for advice if you are unhappy with the change.

## 2. Your contract of employment

**2.1** All employees have a contract of employment, whether it is written down or not, once they have agreed to perform a task for which the employer agrees to pay wages. Some terms of the contract are expressly agreed between the employer and employee. Other terms will be implied, for example by conduct or through custom and practice.

**2.2** Terms may also be incorporated into the contract from other documents or agreements, such as company rules, procedures or staff handbooks. Examples of such policies would include use of email and the internet, harassment or company car policies. Infringement of these policies could lead to disciplinary action. Members should ensure they have access to such documents.

### **Evidence of the contract**

**2.3** Evidence of the contract can be in written documents or verbal agreements. With personal contracts it is extremely important that the individual worker keeps records of all agreements, including the letter of appointment, written statement of terms and conditions, any letters or emails adding to or changing the original terms, and any records of meetings with the employer concerning the contract.

### **Written statement of terms and conditions**

**2.4** All employees are entitled to a written statement of their terms and conditions. This statement must be given to the employee within two months of their starting work.

**2.5** The written statement must contain the following information:

- names of employer and employee
- date the employment began
- date that continuous employment began
- scale or rate of pay or how it is calculated
- intervals of pay (ie monthly, weekly, etc)
- hours of work
- amount of holiday entitlement and holiday pay
- sickness arrangements and sick pay
- any terms relating to pensions
- length of notice of termination required to be given by employer and employee
- job title or brief description of the work
- details of place of work and any mobility obligations
- reference to collective agreements which affect the terms and conditions of employment
- separate details if the employee is to work outside the UK

- details of disciplinary and grievance procedures
- the expected termination date if the contract is for a fixed term.

**2.6** Most of these items must be included in the principal statement, although for some items it is sufficient for the statement to refer to other documents to which the employee has access.

**2.7** Always check the written statement carefully before agreeing to it.

**2.8** The written statement will be the main record of your contract but make sure you have seen and understood any staff handbook or other document which may form part of the contract. Members can obtain advice from Prospect about their contract and are advised to do so before agreeing any terms.

# 3. Employment status

**3.1** Many rights at work depend on your employment status. To benefit from most rights you need to be an employee, although an increasing number of rights apply to a broader category of worker. Only the genuinely self employed are excluded from all employment rights. The legal distinction between employee, worker and self employed is not very clear, so if in doubt you should seek advice from your Prospect representative or full-time officer and see our members' guide to atypical workers.

## Employees

**3.2** Employees are defined as those who work under a contract of employment. They will include most people who take up employment and work on a regular basis for set hours and pay. In the event of a dispute arising and being examined by an employment tribunal, a range of factors will be considered, such as whether you must do the work personally or could send a substitute; whether tax and national insurance is deducted from your pay; whether the organisation provides the tools for the job, and how you are seen by customers or contacts of the company or organisation. One of the most important factors is whether there is a mutual obligation on you to undertake work and for the employer to provide it.

## Workers

**3.3** Workers may not meet all the above tests, and often pay their own tax, have more flexibility about when they work, and might work for other organisations as well. Often workers on atypical working arrangements will fall into this category, for example freelancers, consultants, agency workers etc. But unless they are genuinely self employed and in business on their own account, they will still qualify for some rights. These include rights to:

- limits on working time
- national minimum wage
- be accompanied at grievance or disciplinary hearings
- not be discriminated against on grounds of a protected characteristic (see Section 10).

**3.4** Many Prospect members on personal contracts will be employees with the full range of rights. But always seek advice if your employer claims that you are self employed and you are unsure of the position.

## Zero hours contracts

**3.5** Workers employed on zero hours contracts will not have a set minimum number of hours to work, but can be called in as and when required. The same tests to establish

employment status will need to be applied, but usually people working on zero hours are workers and may be employees. See our Employment Law briefings Zero hours contracts and associated atypical working and Special legal briefing on zero hours contracts.

# 4. Terms and conditions

**4.1** As the terms and conditions of your employment will be individual, you need to scrutinise them carefully. All the terms listed in the written statement (see Section 2.5) should be considered in detail before agreeing to the contract. When moving to a personal contract, ensure that the terms and conditions are no worse than those negotiated through any collective bargaining process in your workplace.

**4.2** Look particularly at the provisions relating to salaries, annual leave, sick pay arrangements, maternity leave, parental leave, the pension scheme and redundancy provisions. If in doubt about any of these seek advice from Prospect.

## Identity of employer

**4.3** It is important that the statement of terms and conditions makes quite clear who is the employer. This is not always straightforward – it may be complicated in the private sector where there are groups of companies and subsidiaries, or in the public sector where you may work in a department, agency or non-departmental public body.

## Job description and duties

**4.4** The statutory provisions relating to the job title and duties require only limited

information to be included in the written statement. You should ask for a full job description, though you should note that often employers will not give a full description, but seek to rely on a title and a statement that the employee must carry out all reasonable duties. Many employers will include in the job description or contract a statement that the employee is expected to undertake other duties as required. Make sure that all duties are within a range of recognised knowledge and within your specific competency or abilities. Any flexibility in the duties should be applied reasonably, and if the phrase seems to be too encompassing seek advice before agreeing it (for flexibility clauses see Section 12). Any changes to your duties should be mutually agreed.

## Hours

**4.5** The contract should ideally specify the number of hours and when they are to be worked. It should also make clear whether overtime is expected and if so the rates for overtime pay, if any. Many contracts simply state a minimum number of hours or state that you will be expected to work additional hours as required. Be wary of these sort of clauses and try to get an idea of the hours expected.

**4.6** Under the Working Time Regulations you should not be required to work more than an average of 48 hours per week. The average is usually calculated over a 17-week period, so this allows for some flexibility. In the UK, employers can currently ask workers to agree to 'opt out' of this 48-hour limit, but Prospect advises workers to resist this. Some workers are excluded from the effects of the regulations, including 'managing executives', but this should only apply to the most senior level of management such as a chief executive. It should not be applied to other managers. If you are under pressure to work very long hours seek advice from Prospect.

## **Fixed-term contracts**

**4.7** If the job is temporary you need to know whether it is a fixed-term contract and the expiry date. Section 11 gives more detail on fixed-term contracts.

## **Mobility clauses**

**4.8** The written statement must include details of the place of work. Before agreeing a contract you should be clear whether there is a clause which allows the employer to insist that you are mobile and can therefore be moved to another site or location. If there is a mobility clause you should check what relocation expenses will apply.

## **Pay issues**

**4.9** Many people on personal contracts do not have a formal pay agreement or salary progression. If this applies to you, try to have information included in your contract about how and when salaries will be reviewed. If you are paid performance-related pay, ensure you are aware of the form of appraisal and how the appraisal system works. Appraisal arrangements should be fair and reasonable with realistically achievable targets agreed in advance between the employee and manager. If there is a job evaluation scheme ensure you know the principles of the scheme. Check what overtime arrangements apply, if any. Check whether you are being offered an all-inclusive salary or simply a basic salary with add-ons such as overtime, bonus, share options etc.

**4.10** Bonuses tend to be extremely discretionary. You should press for information on how they will be awarded and calculated. Because they are discretionary there is no automatic entitlement to the same rate of bonus in the future. Bonuses are usually non-pensionable, so they should not be used as a regular enhancement to your basic salary.

**4.11** If you work in an area where Prospect is organised, we may be able to help you gather information about the appropriate pay rates.

## Expenses

**4.12** It is an implied term in all contracts that the employer will reimburse reasonable expenses incurred in the course of employment. Check whether expenses are paid on the basis of set amounts or on the actual expenditure incurred, and whether proof of expenditure is required. Expenses will be tax deductible if they are wholly, necessarily and exclusively incurred and if the expenses arise out of the proper and actual performance of duties.

## Notice of termination of employment

**4.13** After one month of employment, employees are entitled to at least the statutory minimum notice. This is one week for up to two years' service, and then one week a year up to a maximum of twelve weeks. Many contracts allow for longer periods of notice. Check the amount of notice required on both sides. If the employer dismisses without giving correct notice the employee may be able to sue for wrongful dismissal, as long as the dismissal was not for gross misconduct.

**4.14** Check the contract to see if there is a provision which allows the employer to impose a period of 'gardening leave' during the notice period. If there is a gardening leave clause, try

to ensure that this period is counted towards any post-termination restrictions (see Section 8). Also check to see if the contract provides for you to be dismissed summarily and then paid in lieu of notice.

## Termination clauses

**4.15** Some contracts have a list of circumstances whereby the employment will be terminated, for instance if the employee becomes bankrupt or seriously mentally ill. These clauses will not automatically override rights to claim unfair dismissal, but may affect such claims and would also be relevant in wrongful dismissal claims. Be particularly wary of any clauses which suggest that employment will automatically terminate after a set period of sickness. Such circumstances should be carefully considered – if necessary seek advice from your Prospect full-time officer.

## Pensions

**4.16** A pension is a key part of the remuneration package. For advice on pension issues contact your full-time officer in the first instance. Prospect also has dedicated pension officers who can provide advice and assistance where necessary.

**4.17** All employers must now provide a workplace pension scheme – known as auto enrolment. It applies to all ‘workers’ (see section 3) who earn at least £10,000 a year and ordinarily work in the UK. This is covered in separate Prospect guidance.

## **Redundancy**

**4.18** Redundancy terms are often not included in the written statement you are given. Be sure to check what redundancy agreements exist in relation to severance payments and procedures.

# 5. Intellectual property rights

**5.1** Many contracts contain a clause about intellectual property rights. Intellectual property rights (IPR) usually belong to the person who created the work. However where the work is produced in the course of employment by an employee the law provides that the IPR belong to the employer, unless there is a specific agreement in place to the contrary.

**5.2** Work created in the course of employment is defined fairly widely. Under the Patents Act an invention made by an employee shall be taken to belong to the employer if:

- it was made in the course of the employee's normal duties, or
- in the course of duties falling outside of normal duties but specifically assigned to them, and
- such an invention might reasonably be expected to result from the carrying out of the duties.

## Ownership of IPR

**5.3** Work created during working hours or directly related to the employment will usually be held to be owned by the employer; for example articles written by an employee as part of their work, or training courses devised

or delivered as part of the job would belong to the employer.

**5.4** Ownership of IPR can be more difficult to determine in respect of work created which is not done specifically in work time or at the behest of the employer. Case law has held that even if the work is created in the employee's own time and using their own resources it may still belong to the employer if it can be shown that it falls within the general duties the employee is expected to carry out. For example, where a Prospect member works as a curator in a museum and writes a book in their own time about part of the museum's collection, the IPR is likely to be held to be owned by the employer. This can be a complicated issue and detailed advice should be taken where there is doubt.

## Payments to employees

**5.5** The employee is not automatically entitled to any share of the profits from copyright work done in the course of their employment, but there can be specific agreements on fees or benefits being shared. Under the Patents Act there are specific provisions for an employee to gain some financial compensation where the invention is of 'outstanding benefit' to the employer.

**5.6** In some organisations there are collective agreements with the unions about how profits will be shared. The effect of such agreements varies widely; some establish a panel to make decisions on rewards to inventors with clear criteria for payments; while others leave much more discretion to individual circumstances.

**5.7** If you are creating original work which may be related to your work as an employee it is best to have the position clarified from the outset. You should seek advice from Prospect about the detail of any such clause in your contract.

# 6. Grievance and disciplinary procedures

**6.1** A good grievance procedure is essential in a personal contract. It is your way of raising issues you are unhappy about and can be a useful procedure for negotiating changes to the contract. Similarly it is important that there is a clear and fair disciplinary procedure. Disciplinary rules and codes of conduct are often included with the disciplinary procedure and it is important that you are aware of the standards expected in your job. Prospect representatives and negotiators have a wealth of experience in dealing with both kinds of procedure.

**6.2** ACAS, the advisory service, has issued a code of practice with guidance on what grievance and disciplinary procedures should contain. Your employer should be encouraged to follow these standards as a minimum.

**6.3** Where either side does not fully follow the grievance or disciplinary procedure, an employment tribunal hearing a complaint related to the grievance or disciplinary matter may reduce or increase compensation by up to 25%.

## The right to be accompanied

**6.4** The Employment Relations Act 1999 provides that employers must allow workers the right to be accompanied by a trade union representative at disciplinary or

certain grievance hearings. This applies in all workplaces, whether or not Prospect is formally recognised.

**6.5** In areas where there is full Prospect recognition, union negotiators and staff regularly represent members at these hearings. This right is often written into the recognition agreement, or the disciplinary or grievance procedures.

**6.6** The statutory right to be accompanied applies where the worker is required or invited to attend a grievance or disciplinary hearing, and they reasonably request to be accompanied.

**6.7** If you need advice or representation from Prospect then contact your local Prospect representative or full-time officer. Members should note that legal advice and other assistance at the workplace is offered at the discretion of the union, and will be decided on an individual basis depending on the facts and merits of the case.

# 7. Non-pay benefits

**7.1** Non-pay benefits are often an important part of a personal contract. You should establish what benefits are available to you and others in your position. The employer is under a contractual obligation to take reasonable steps to bring to the employee's attention the existence of a 'valuable right' or benefit to which they may be entitled.

**7.2** Non-pay benefits can be attractive additions to basic salary, but always check the real value of such schemes to ensure they do not keep your salary artificially low.

**7.3** Non-pay benefits are mostly regarded as an addition to salary and are therefore taxed at the appropriate rate. Detail on the income tax position of non-pay benefits is outside the scope of this guide. But the general rule is that employees will be taxed on money, or 'moneys worth', received from the employer, so most non-pay benefits will be taxable.

## Company cars

**7.4** The most common non-pay benefit is a company car. When staff are moved on to personal contracts a car is often included in the package as an enticement to agree to the contract. In some cases the car is provided under a leasing arrangement, in others it may be purchased outright by the company.

**7.5** Cars are counted as taxable income if they are provided by the employer partly or wholly for private use. HM Revenue & Customs calculates the taxable amount on the basis of a percentage of the value of the car. Tax charges are graduated according to the level of the car's carbon dioxide emissions. Larger and older cars are likely to be much less carbon efficient and charged a higher rate of tax.

**7.6** It is important that the conditions of entitlement to a car are clearly spelt out between the employer and employee. If offered a company car you should clarify:

- whether the car is also for personal use or merely provided for business needs
- what expenses are to be paid by the employer – for example petrol, road tax, etc
- what are the insurance requirements
- whether there is any requirement to pay the excess in the event of an insurance claim
- conditions relating to the return of the car on termination
- the make, model and value of the car you are entitled to.

**7.7** If you do not want a car there may be a cash allowance instead. Be wary, as this is not usually part of pensionable income, and the value of the car may not seem

so generous after bulk discounts. Some companies will trade up or down the model of car, with employees paying or being paid the difference.

## **Employee shares and share options**

**7.8** Various schemes enable employees to own shares in the company for which they work. Employee Share Option Schemes (ESOPs) give employees an opportunity to acquire some ownership of the company, and to benefit from company profits through their shares.

**7.9** There are three main types of scheme:

- Profit sharing – where companies put cash from their profits into trusts, which then use the money to buy shares for workers.
- Save-as-you-earn share options – where employees save money in building society accounts in order to buy shares, using the options granted by employers.
- Approved share options – a more discretionary scheme open only to certain employees, and sometimes linked to conditions such as performance.

**7.10** Check any prospective scheme carefully, particularly the value of the scheme and what happens to the shares on termination of employment. Refer to Prospect if in any doubt.

## **Other benefits**

**7.11** Common benefits offered by employers are private health insurance, training expenses, mobile phones and sporting or recreational facilities. Check the details of each scheme carefully.

## **Flexible benefits packages**

**7.12** Some employers offer a package of 'flexible benefits'. This is where the employee is awarded points which they can then exchange for different benefits of their choice. If you are offered such a scheme take advice from Prospect before exercising your options.

## **Training**

**7.13** Opportunities for training and career development in employment are essential. You should try to clarify with your employer from the outset what opportunities exist.

**7.14** Some employers have a clause in the contract requiring the employee to repay a proportionate cost of training if they leave the job within a certain period. If such a clause is in your contract make sure you are clear about the liabilities because they can amount to a substantial sum.

# 8. Restrictive clauses

## During employment

**8.1** Many contracts have specific clauses requiring the employee to maintain confidentiality of the employer's business interests. Even if this is not expressly included there is an implied duty of fidelity. This means that an employee should give honest, loyal and faithful service during employment, must not compete with the employer, make secret profits from the employment, or divulge the employer's confidential information and trade secrets.

## After employment

**8.2** Clauses in the contract which attempt to restrain the employee's freedom after leaving the job are known as restrictive covenants. These are increasingly common in personal contracts.

**8.3** There are several types of restrictive clauses which apply after leaving the job. The most common are:

- maintaining confidentiality of information
- restraints on working for competitors
- restrictions on soliciting or dealing with customers
- non-solicitation of employees.

**8.4** Such restrictive clauses normally have to be expressly agreed in writing to be effective.

**8.5** The courts have held that such clauses are only lawful if they can be justified as being no greater than necessary to protect a legitimate interest of the employer. They must also be reasonable in relation to the interests of the parties and the public.

**8.6** The courts have also held that employers can only seek to protect matters such as goodwill, trade secrets, confidential information and trade or customer connections.

**8.7** The reasonableness of a clause will depend on a range of factors such as the nature or scope of the employer's business and customer connections, the status and position of the employee, the geographical area of the restriction, and the duration of the restraint.

**8.8** Many such clauses will be limited to customers or accounts that the individual worked on personally in the last year of their employment.

**8.9** It is often difficult to advise on the enforceability of such clauses in advance as that will depend on the individual circumstances. However, a clause that says

an ex-employee cannot work in the same field anywhere in the UK for ten years after the termination of employment is likely to be void and unenforceable. A clause which says that an ex-employee must not work for a competitor within a ten-mile radius for six months after termination is more likely to be enforceable. The more widely a clause is drafted, the less likely it is to be enforceable.

# 9. Statutory employment rights

**9.1** All employees, including those on personal contracts, have employment rights which are protected by law. Some rights depend on length of service while other basic rights apply from the first day of work. Where they apply, the qualifying periods set out below are shown in brackets.

## Statutory employment rights

### 9.2 Contracts and pay

- not to have unlawful deductions from wages
- written statement of particulars of employment
- national minimum wage (from April 2019: £8.21 for workers age 25 and over; £7.70 for 21-24 year olds; £6.15 for 18-20 year olds; £4.35 for under 18s and £3.90 for apprentices. The rates change every year)
- a right to request flexible working (*26 weeks*).

### 9.3 Working time

- not to work more than an average of 48 hours a week
- rest periods of 11 hours a day and 24 hours a week (note that there are exclusions)
- a 20-minute break if working more than 6 hours
- 5.6 weeks paid annual leave a year

### 9.4 Equal rights

- not to be discriminated against on grounds of a protected characteristic (see section 10)
- equal pay between women and men
- equal treatment for part-time workers
- equal treatment for employees on fixed-term contracts
- no detriment for trade union membership or activities

### 9.5 Family rights

- 13 weeks unpaid parental leave (*one year*)
- reasonable time off to care for dependents in exceptional circumstances
- 52 weeks maternity or adoption leave or shared parental leave
- paternity/co parent leave of two weeks (*26 weeks*).

### 9.6 Termination of employment

- notice of termination of employment (*one month*)
- unfair dismissal (*two years or one year in Northern Ireland*)
- unfair dismissal on grounds of pregnancy, childbirth, asserting a statutory right, trade union activities or membership, health and safety activities, making a protected disclosure (whistleblowing), or for being an

employee representative or pension trustee  
(*no qualifying period*)

- statutory redundancy payment (*two years*)
- written reasons for dismissal (*one year*)
- breach of contract arising or outstanding on termination of employment

## Enhanced contractual rights

**9.7** Some employers will allow more generous terms than the statutory minimum in the contract of employment, for example enhanced maternity pay and maternity leave entitlement. Check the terms of your contract carefully.

## Continuity of employment

**9.8** Many employment rights depend on the length of time employed in the job, for example two years service is required for a redundancy claim. It is therefore important to establish 'continuity of employment'. Breaks of less than a week do not usually break continuity, and neither does absence on account of holidays, sickness or maternity leave or where there has been a temporary cessation of work or an arrangement to take a break. If there are gaps in your employment you may still have continuous employment in legal terms. If in doubt seek advice.

**9.9** If your employer changes, your continuity of employment is not automatically broken. There may be a change of employer if you are transferred from a government department to a private employer, or if you already work in the private sector and a new company takes over the business that you work for. Generally under the Transfer of Undertakings regulations (TUPE) your employment and all your terms and conditions of employment transfer to the new employer.

## Whistleblowing

**9.10** The Public Interest Disclosure Act introduced protection for workers who 'blow the whistle' at work. All workers, regardless of their length of service, have a right not to be subjected to a detriment at work or dismissed for raising an issue of public concern. To gain this protection the disclosure must be about a specific issue, including health and safety, a criminal offence, an environmental matter, failure to comply with a legal obligation, or a miscarriage of justice. In addition, proper procedures must have been followed in raising the concern. If you are in this position seek advice from your Prospect full-time officer before taking any action and see our members' guide on whistleblowing.

## Information and consultation

**9.11** There is a legal obligation on employers with more than 50 employees to inform and consult with representatives on a range of workplace issues. The duty only applies where at least 10 per cent of the employees request it. This is not as effective as full union recognition but is useful in non-unionised workplaces.

## Legal action

**9.12** The time limits on starting legal action for many of these rights are very strict. For example, an application for a claim of unfair dismissal must be lodged within three months of the date of dismissal; and a claim under the Equality Act must be lodged within three months of the act of discrimination.

**9.13** Before presenting a claim to the employment tribunal, the employee must make an application for Early Conciliation through ACAS. This must be done within three months of the effective date of termination of employment. If the claim is not settled at this stage, ACAS will issue a certificate to say conciliation has failed. This will be necessary to make a claim to the tribunal.

**9.14** The period in early conciliation effectively stops the clock for presenting

the formal claim to the ET. The rules on this are complicated and members should seek more advice from their negotiator and see Prospect's employment law briefing on early conciliation at: <https://library.prospect.org.uk/download/2014/00489>

**9.15** The time limit can only be extended in very exceptional cases. For unfair dismissal cases, extension would only be allowed where it was not reasonably practicable to make the claim in time. For discrimination cases the tribunal can only extend the time limit where it is just and equitable to do so.

**9.16** This is a general outline of the law as it covers England, Wales and Scotland. There are some differences in Northern Ireland and the Isle of Man. For example, the Fair Employment Act in Northern Ireland also provides protection against discrimination on the grounds of religion or political belief. And many of the cuts to employment rights imposed since 2012 in England, Wales and Scotland do not apply in Northern Ireland.

**9.17** For more information on all the rights listed, seek advice from your Prospect representative. Information on statutory rights is covered in separate members' guides and the Prospect members' factcard 'Your legal rights at work'.

# 10. Equality at work

**10.1** The inherent flexibility and discretion within personal contracts make it important to ensure that discrimination does not occur. Pay and entitlement to contractual benefits should be transparent and widely understood.

**10.2** If the employer has an equality and diversity policy, its provisions should apply equally to people on personal contracts. If this is not the case, seek advice from Prospect.

**10.3** Discrimination by an employer on the grounds of the following protected characteristics is unlawful:

- age
- disability
- gender reassignment
- marriage or civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

**10.4** Discrimination may apply in relation to:

- selection or recruitment arrangements
- refusal of employment
- training, transfers, and promotion opportunities
- terms and conditions of employment

- benefits and services
- dismissal
- or other detriments.

## Pay secrecy clauses

**10.5** Some employers forbid workers from disclosing their salaries. But the Equality Act outlaws pay secrecy clauses. Workers can declare their own pay where the purpose of the disclosure is to find out if there is discrimination in pay.

## Gender pay gap

**10.6** All employers with 250 or more staff must publish figures on their gender pay gap each year. This is the mean and median average pay difference for women and men across the organisation.

## Types of discrimination

**10.7** Unlawful discrimination can be either direct or indirect. Direct discrimination is where someone receives less favourable treatment on grounds of a protected characteristic. Indirect discrimination is where an employer applies a provision, criterion or practice to all employees which puts people of a particular protected characteristic at a disadvantage compared to other workers

and which is not a proportionate means of achieving a legitimate aim.

**10.8** The Equality Act aims to ensure that women and men are paid equal pay for like work, work rated as equivalent, and work of equal value. This right applies not just to pay itself but to all other contractual benefits such as holiday entitlement and company benefits.

**10.9** Under the Equality Act the employer has a duty not to treat someone less favourably because of their disability or for a reason arising in consequence of their disability; and also to make reasonable adjustments to the working environment or arrangements in order to enable a person with a disability to take up, or remain in, employment.

**10.10** Harassment related to a protected characteristic is also unlawful. The Act defines harassment as subjecting someone to unwanted conduct which has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

**10.11** The law provides statutory protection against victimisation. This makes it unlawful to victimise a person for bringing a discrimination case, giving evidence or alleging a breach of discrimination law.

**10.12** If you believe you are the victim of discrimination or harassment, contact your Prospect full-time officer immediately as legal action would need to be started within three months of the incident occurring.

**10.13** See the *Prospect Members' Guides to Equality at Work and Harassment and Bullying* for more information.

# 11. Fixed-term/temporary contracts

**11.1** Many workers are recruited on fixed-term or temporary contracts. This applies to people on personal contracts as well as to other employees. However, most people on personal contracts are not on fixed-term contracts, and very few will be on casual appointments. Prospect is opposed to the indiscriminate use of temporary contracts. There is a separate Prospect Members' Guide to Fixed-Term Contracts.

## Fixed-term contracts

**11.2** A fixed-term contract (FTC) is where the employment contract is for a specified period or for a specified task or dependent on a certain event, such as funding.

**11.3** If you are on an FTC which is renewed, your continuity of employment will normally be assessed throughout the entire period of your employment. For example, if you are taken on for two years and are then offered a further year's contract, you will have three years' continuous employment.

**11.4** If the employer terminates your FTC before the expiry date and there is no provision in the contract to terminate with notice, you may be able to sue for wrongful dismissal. Because the employer has made a contract to employ you for a fixed period, they could be in breach of contract if they

dismiss you before then. This does not apply if the dismissal was for gross misconduct.

## Equal treatment

**11.5** All employees on fixed-term contracts are entitled to be treated equally to colleagues on a permanent contract who are employed by the same employer doing similar work, and have similar skills and qualifications. This will apply unless the employer can objectively justify a difference in treatment. If you consider you are not getting the same terms and conditions as other workers, seek advice from your Prospect representative.

## Limits on fixed-term contracts

**11.6** The law limits the use of fixed-term contracts. If, when a fixed-term contract is being renewed, the employee has already been continuously employed for four years the contract will become permanent, unless the employer can objectively justify a further fixed term.

## Casual recruits

**11.7** Casual recruits are another example of the use of temporary or short-term appointments to cover short-term vacancies. Casuals do not have a specific

termination date in their contract. They will rarely be retained for more than two years, as they would then obtain greater employment protection rights. People on casual appointments are entitled to the same statutory rights as people on indefinite contracts. In law there is no difference between a casual and permanent contract. But in reality many employers appoint casuals on worse terms and conditions of employment than permanent staff.

# 12. Changes to the contract

## Variation of contract

**12.1** A contract can only be lawfully varied by mutual consent. If your employer seeks to impose a change in your contract they may be acting in breach of contract. You may be able to sue for breach of contract, or resign and claim that you have been constructively dismissed. Your legal remedies will depend on the nature of the breach of contract and its seriousness. But in many cases the legal remedies are ineffective or inadequate.

**12.2** If the change of contract involves a financial loss (such as a reduction in pay or allowances) the employee will be able to take a claim to the employment tribunal for unlawful deduction of wages. Alternatively they may be able to sue in the County Court for breach of contract. In Scotland the claim is made in the Sheriff's Court.

**12.3** Alternatively, or in situations where the breach does not have a financial loss (such as a reduction in holiday entitlement), the employee can resign and bring a claim for unfair constructive dismissal. Constructive dismissal is where the employment is terminated by the employee because the employer has fundamentally breached the contract of employment. You will usually need to have two years' continuous employment to bring a claim (one year in Northern Ireland.)

**12.4** In order to succeed in a constructive dismissal case the employee has to demonstrate a fundamental breach of contract which they were entitled to accept as bringing the whole contractual relationship to an end. The burden of proof for establishing constructive dismissal is on the employee. The employee will need to show that:

- there has been a fundamental breach of contract going to the heart of the employment contract
- they acted quickly upon the breach being notified, so that they have not affirmed the new terms
- the reason for resigning was the breach itself.

**12.5** Even if a tribunal makes a finding that there was a fundamental breach of contract, and therefore the employee had been dismissed, it could still decide that the dismissal was fair, for example if it held that the employer had very good reasons for taking the action.

**12.6** Constructive dismissal is clearly only a last resort. Members should always seek detailed advice from their full-time officer before taking any action.

**12.7** If your employer attempts to vary your contract to your detriment, you should

write immediately to the employer stating that you do not accept the change and are seeking further advice. Refer the matter, and all correspondence, immediately to your Prospect full-time officer. If you do nothing you may be deemed to have accepted the change. There are strict time limits for taking legal action; for an employment tribunal application this is usually three months from the date of the deduction or dismissal, so do not delay seeking advice.

## **Flexibility clauses**

**12.8** Many employers seek to get round the restrictions on variation by making the contract as wide-ranging as possible, using flexibility clauses. A typical example is a mobility clause which allows the employee to be moved from one location to another, or where there is a very wide job title or description. If a change is allowed in the contract, enforcing this change is unlikely to be a breach of contract.

**12.9** Even where a flexibility clause gives room for variation within the contract, there may be situations where the employer imposes the variation unfairly or does so in contravention of a statutory provision. This may be a breach of contract. A clause that simply says the employer reserves the right to vary any term

of the contract is unlikely to be enforceable, unless it is a minor change.

**12.10** Although flexibility clauses may not always be enforceable, it is better to resist having them at all.

# 13. How to negotiate changes

**13.1** Prospect does not generally negotiate the terms of personal contracts for the workforce as a whole. But in some areas with personal contracts, the union is involved in consultation and negotiation over some terms and conditions. Where contracts are individually negotiated, employees have to negotiate for themselves, with advice and assistance from the union.

**13.2** Whether you or your employer want to make a change to the contract you should always:

- see whether the change affects other colleagues – there may be strength in numbers
- gather relevant information – details of the present contract, the proposed change, and any supporting information such as pay comparisons etc
- consider any implications and seek advice if necessary.

**13.3** The main change the employee is likely to want is to increase pay. Some personal contracts involve an agreed progression with a defined pay structure and scales. Others are much less defined. The starting point is to gather information about pay rates or increases for comparable workers or jobs. Prospect can help you obtain this information.

**13.4** Do not be hurried into agreeing a variation. Always ensure that you have time to consider your position and seek advice if necessary.

**13.5** Be positive. Employees entering individual negotiations should be well prepared, with clear objectives and the information to back up their position. Ensure negotiations are on a formal footing, with any agreements made in writing.

**13.6** If you cannot reach agreement you should consider using the grievance procedure. Your Prospect representative will be able to advise and may be able to represent you at the hearing.

# 14. Contract checklist

If you are offered a new contract, for example on promotion to a grade with personal contracts, or if your employer decides to bring in personal contracts for your role, use this checklist to consider whether it is acceptable, or whether you need further advice.

## Agreeing a contract

- Does the written statement of terms and conditions cover the full range of items? (see Section 2.5)
- Are there flexibility clauses which may cause problems later on, eg over mobility or job content?
- Does the statement cover additional contractual provisions such as maternity provision, parental leave?
- Is there an agreed pay progression system?
- If there is a bonus scheme is it clear how it will operate?
- What overtime arrangements exist?
- Are the sick pay and annual leave terms acceptable?
- Are employee benefits acceptable? Is there alternative provision for certain benefits?
- Is there a pension scheme?
- Is there enhanced redundancy pay? Is there a redundancy agreement?

- Is there a grievance and disciplinary procedure?
- Are restrictive covenants fair and reasonable?

## New contract for the same employer

- Does the statement correctly record your starting date for continuous employment?
- Have there been changes to the terms and conditions from the old contract?

## Other points

- Does the contract recognise the right to belong to a trade union and to be represented by the union? Is the union recognised for any negotiations on behalf of your post? Seek advice before raising this issue with your employer.
- Consider whether the workforce would support a claim for union recognition in order to have collective bargaining.
- Are there other documents referred to, for example staff handbooks? If so do you have access to these documents? Is the information in them acceptable?
- Does the employer have an equal opportunities policy? Does the contract comply with anti-discrimination legislation?

- Does the employer have a health and safety policy?
- Is the contract for a fixed term? If so, are the conditions equal to other employees?
- Does the contract purport to be a contract for services, ie for the self employed?
- Does the employer offer opportunities for training and career development?



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