LAW PUNDITS

Note On Employee Handbooks

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NOTE ON EMPLOYEE HANDBOOKS

Certain aspects of the employment relationship have to be included within a contract of employment that is given to the employee. This is discussed under the written statements.

Other terms must be put in writing, but only need to be 'reasonably accessible' to the employee. The employer can choose whether to have them as separate documents, or as a group of policy documents, or to put them into an employee handbook. They include:

- disciplinary and grievance rules
- holiday pay, and
- sickness absence and pay

There is no requirement to have an employee handbook but the advantage of using one is that it can deal with a wide variety of aspects of the company's rules and culture, rather than simply focusing on the con-tractual rights of the individual employee. It can also present rules and policies in a less legalistic way which may be easier to understand.

Contents of Employee Handbooks

In case of drafting an employee handbook, it should include:

- formal policy documents, such as disciplinary and grievance rules, holiday pay, sickness absence and sick pay
- other policy documents, such as an equality or equal opportunities policy, flexible working policy or whistleblowing policy
- rules and procedures for the smooth and efficient running of the business, such as a company dress code, reclaiming expenses and access to corporate benefits
- a general statement about the aims of the business and the culture that the employer would like to operate

In larger organisations, the employee handbook may not be a physical book at all: it may be a variety of information made available on the company's intranet.

Contractual Force

The most important issue to consider when deciding whether to have a handbook and, if so, what to put in it, is whether you want the contents of all or part of the handbook to have contractual force.

Generally, policies are included in employee handbooks (rather than in contracts of employment or written statements of particulars) to make it clear that they are not intended to have contractual force. It is a good idea for policies such as disciplinary procedures to expressly state that they are not intended to have con-tractual force, to avoid employees trying to prolong their employment by claiming that they are entitled to have the procedure followed before they can be dismissed for a disciplinary offence. The status of other policy documents such as the equality or equal opportunities policy or dress codes will depend upon the precise nature of the policy and the way in which they are phrased. General statements about the aims of the company are highly unlikely to have contractual force.

If the employer does wish the handbook (or sections of it) to have contractual force, it is advisable to have a term in the contract of employment which refers to the handbook and states that the employee has received the handbook and is aware that it is part of his contract of employment.

Even if the handbook does not have contractual force, it is sensible to require that employees sign to say that they have received the document, to minimise the risk that they subsequently claim that the rules or policies in the handbook were never brought to their attention.

It is frequently the case that an employee will be issued with a relatively short statement of terms and conditions of employment, but also provided with a much more voluminous staff handbook. The contents of that handbook will often be very mixed:

- some of it will be very specific, concrete terms on subjects like entitlement to annual leave, parental leave, or sick pay

- some of it may consist of much vaguer material, such as broad policy documents, or even aspirational statements of corporate aims and goals

The questions that often arise in this context are:

- how to tell whether or not a particular part of the handbook gives rise to specific enforceable contractual rights between the parties, and
- to what extent it is permissible to look at other facts and matters extraneous to the handbook itself in determining whether particular parts of it are or are not legally binding

Determining Which Parts of an Employee Handbook are Potentially Contractual

Where employee handbook documentation is broad-ranging, and there is clearly an intention to make some parts of it contractually binding, questions may arise as to which parts of the handbook are supposed to give rise to contractually enforceable rights, and which are not.

For example, in Harlow:
(Harlow v Artemis International Corporation [2008] IRLR 629)

- the letter initiating employment stated that various further terms and conditions were to be found in the 'Staff Handbook'
- the 'Staff Handbook' referred to was originally a 'hard copy' manual, but had later been substituted by an intranet website
- the website was extensive, and consisted of a variety of discrete folders on separate subjects. A dispute arose as to which parts of it were considered to be part of the 'Staff Handbook' re-ferred to in the letter

To resolve such questions, witness evidence is admissible in order to identify which documents potentially form part of the contract, if that is not clear from the documents themselves. This does not contravene the parol evidence rule, which only prohibits the use of such extrinsic evidence to interpret terms which are agreed to be part of the contract.

Determining Which Terms of a Handbook are Apt for Incorporation

Once the court or tribunal has determined which documents potentially form part of the contract, it does not necessarily follow that every term in each constituent document will have contractual force.

For instance, where a contract of employment expressly incorporates another document such as a collective agreement or staff handbook, not all the provisions in that agreement or handbook will necessarily be terms of the contract, because some of them may not be of a sort that is apt to create a binding contractual term. Declarations of an aspiration or policy are, for example, unlikely to be apt to form contractual terms. So it may well be that where a staff handbook is expressly incorporated by reference, some of its terms will be-come terms of the contract, whilst others will not.

In determining which terms are apt for incorporation, the following relevant principles apply:
(See, Keeley v Fosroc [2006] IRLR 961)

- the fact that another document is not itself contractual does not prevent it from being incorporated into the contract if an intention is shown as between the employer and the individual employees for it to be incorporated
- where a second document is expressly incorporated into the contract, it is still necessary to consider whether any particular part of that document is apt to be a term of the contract
- where there is no express incorporation of a document, but the court is instead left to infer the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not it was intended to have contractual force
- the fact that a staff handbook refers to itself expressly as a collection of 'policies' does not pre-vent parts of that material having contractual effect if, by their nature and language, they are apt to be contractual terms
- the importance of an individual provision to the overall 'bargain' is a highly relevant consideration, eg the importance of enhanced redundancy terms in the context of an overall remuneration package. Even where a term is couched

in terms of information or explanation, or ex-pressed in discretionary terms, it may be still be apt for incorporation as a term of his contract, providing it is not in conflict with other contractual provisions

- provision for redundancy is now a widely accepted feature of an employee's remuneration package and, as such, is particularly apt for incorporation
- it is at least equally important to consider, in isolation, the wording of the individual provision in question. Where a term is put in clear terms of entitlement, it may have contractual effect even if the remainder of the document of which it forms a part would suggest otherwise
- a good way of testing if a term in a handbook (or similar document) is apt for incorporation, is to ask whether, if that term had been set out in identical terms in the main contractual document itself, it could seriously have been argued as a matter of construction that it was not apt for inclusion as a contractual term
- other examples of terms in handbooks that are likely to be apt for incorporation are those which express themselves as providing entitlements, such as terms in respect of annual leave, parental leave or paternity leave
- even where such a term contains a formula and/or amount to be paid under an entitlement which is left entirely as a matter of discretion, courts will go far to give practical effect to the reality of the bargain struck between employer and employee in an exchange of reward for labour. Such provisions should be read not only as providing a contractual benefit to the employee, but also as obliging the employer to assess rationally and fairly the sum due to the employee under that provision (and to pay it)
- the fact that a term is incorporated into the primary contractual document (eg the statement of employment terms) by reference, rather than actually set out in it, is not an argument against contractual effect
- the fact that the formula for calculation of a particular entitlement is expressed in such a way that it may change from time to time, is similarly not an argument against contractual effect, provided the documentation identifies the formula in force at the time when the need to calculate each such payment arises

The fact that the company varied its practice over time in exercising a policy set out in a handbook does not affect an individual's rights under that policy at any given time. For example, the fact that a company has varied its practice over time in making enhanced redundancy payments to other employees does not affect a specific employee's rights under the published policy in force at the time of his redundancy. Where an employer purports unilaterally to change the terms of a contract which do not immediately impinge on the employee at all (changes in redundancy terms do not impinge until an employee is in fact made redundant), then the fact that an employee continues to work, knowing that the employer is asserting that a change has been effected, does not mean that the employee can be taken to have accepted the variation. The employer cannot contend in such circumstances that it is not obliged to comply even with the term that it was asserting to be applicable at the time of the redundancy.

Once it is clear that an individual term in a staff handbook is intended to be of contractual effect, in construing the effect of that term, it is not permissible to take into account extrinsic evidence, such as the views of witnesses, regarding its intention and meaning. Where:

- there is one document, such as a written statement of employment terms, which is acknowledged to have contractual effect, and
- that written statement of employment terms expressly incorporates by reference a second document, such as a staff handbook, in which the clause under consideration is to be found, and
- it is not suggested that there are any other sources which must be taken into account in order to know all the terms of the contract, then
- it is no more permissible to carry out a general fact-finding exercise, looking at extraneous evidence, in order to determine the true intention of the parties regarding that clause in the handbook, than it would be if the relevant term under consideration were contained in the first document itself (ie in the written statement of employment terms)
- rather, it is simply a matter of construing the two documents read together

Modern employment contracts consist of all sorts of materials put together by human resources officers, rather than lawyers, and are designed to be read in an informal

and common sense manner, in the context of a relationship affecting ordinary people in their everyday lives. Close arguments arising out of nuance of language, which might have some validity in interpreting more formal commercial contracts, are singularly inappropriate in relation to employment contracts, unless it is made clear in the document that an important point of distinction is being made.

Amending Employee Handbooks

As regards any part of an employee handbook which does not have contractual force, the employer has the right to alter it unilaterally. Even as regards parts which do have contractual force, an employer may reserve the right to make changes unilaterally. However, the right:

- will need to be expressed in clear language
- will be interpreted restrictively by the courts
- must be exercised in a way which does not breach the implied term of trust and confidence