
EMPLOYERS' E-GUIDE NO. 7

A GUIDE TO THE LAW ON **MULTIPLE CONTRACTS**

April 2007, Employment Relations Unit

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Introduction

This e-guide deals with situations where an employee is employed under more than one contract of employment at the same time, by the same authority. This can cause a number of difficulties, particularly in calculating continuous service for redundancy purposes. This e-guide, aimed at human resources advisors and managers, deals principally with that issue. However, it also covers a number of other employment issues.

1 How do multiple contracts arise?

Due to a number of reasons, an employee may decide to take up another job with the same authority. For example, a school cleaner who is also employed as a catering assistant producing school dinners is likely to be employed under separate contracts of employment for each position.

2 Distinguishing between multiple and single contracts

Just because an employee carries out what would normally be considered to be different jobs, it does not necessarily mean that they are working under more than one contract. Authorities should treat each case on its merits. It is possible that an employee may be carrying out two distinct tasks under a single contract of employment, in which case the considerations outlined in this e-guide do not apply.

3 Redundancy

Continuous service

The issue which is often a problem here is that an employee with two contracts will usually have service starting at two different dates. If the employee is being made redundant from the contract with the later start date, the issue arises as to whether or not continuous service begins from the date on which the first contract started.

The basic rule to follow is that contracts should be treated entirely separately, so that any redundancy calculation should be based on the length of service of the contract from which the employee is being made redundant. The only exception

to this is, if at the time of redundancy the employee is employed under only one contract but in the past there have been one or more other overlapping contracts. In such cases, length of service can be counted back to the start of the first contract if service has been continuous. This view is based on case law which is explained below.

Where two contracts are running concurrently - *Surrey County Council v Lewis*¹

Mrs Lewis, a teacher, had been employed by a number of colleges under a series of fixed-term contracts, normally for a term at a time, from 1969 until her dismissal in June 1983. The contracts of employment were issued separately by each college. At the time of her dismissal she was working at only one college, but for two different departments under separate contracts of employment. The issue in this case was whether the hours from each contract could be aggregated since, at the time the case was brought, the ability to claim unfair dismissal and the right to a redundancy payment depended upon being contracted to work a certain number of hours per week.

The House of Lords held that, as the relevant statutory provisions (e.g. unfair dismissal and redundancy) all focus upon one particular contract, any entitlement to such a right which is dependent on a minimum continuous service requirement arises on the basis of a single contract. A number of concurrent contracts cannot be considered collectively where the contracts involve distinct and separate arrangements and do not form part of a single and composite relationship. In Mrs Lewis's case, her contracts were separate and distinct and therefore could not be aggregated for the purposes of establishing continuous employment.

This judgment relied upon the finding that the contracts of employment were genuinely independent and self-standing. This will always be a matter of fact and degree depending on the circumstances of each individual case. The courts will look very carefully at a practice of employing workers on a number of separate contracts of employment, to make sure unscrupulous employers are not allowed to deliberately deprive employees of their rights.

Where there is only one contract at the time of dismissal – *City of Bradford MDC v Dawson*²

Mrs Dawson had been employed by Bradford Council between December 1991 and June 1996 on one contract (contract A) and between March 1996 and April 1997 on another (contract B). When she was made redundant from contract B she did not have enough service under that contract to qualify for a redundancy payment. She therefore claimed that her service should start at the beginning of contract A. The EAT agreed that she could count the whole of the time she was employed by the Council and was therefore entitled to a redundancy payment. However, the EAT said that their conclusions were confined to circumstances where at the time the contract ended, that was the only contract in existence. They commented that, 'where there are two contracts running along side by

¹ [1987] IRLR 509 HL

² [1999] ICR 312 EAT

side, it is not possible to allow the service or hours under one to feed the other, where the contracts are separate and distinct’.

What happened:

9/12/91 02/06/96 (contract A)

|_____|

04/03/96 27/04/97 (contract B)

|_____| dismissal



Continuous service

Is the Modification Order relevant?

It is important to note that the Modification Order has no relevance to redundancy as far as multiple contracts with separate employers are concerned. This is because the Modification Order only operates to aggregate service under *successive* contracts. It will therefore not apply when contracts run, or have run concurrently, with different Modification Order bodies. The effect of this is that, when an employee is made redundant the employing authority has no need to consider any other contracts which are currently running with other Modification Order bodies.

Calculation of a week's pay

The same principle as outlined above in the *Surrey* case applies to calculating the amount of a week's pay. Where an employee is employed under more than one contract at the same time, the contracts should be kept separate and only the pay earned under the contract from which the employee is being made redundant taken into account for the redundancy payment.

4 Other statutory rights

Unfair Dismissal and Statutory Notice

For the purposes of the right to claim unfair dismissal and the statutory right to notice of dismissal by the employer, the same principles as above should be followed in calculating continuous service.

Statutory Sick Pay (SSP)

The guidance from HM Revenue and Customs is that it is possible for an employee who has two contracts with the same employer to be incapable of work under one of them but capable of carrying out the other. For example, an employee who works as a telephonist and as a cleaner may suffer a physical

injury, such as a broken leg, that would prevent her from working as a cleaner but not necessarily as a telephonist.

When an employee has more than one contract with the same employer, *and* his or her earnings are aggregated for National Insurance Contributions (NICs) purposes, he or she must be incapable of working under all contracts before becoming entitled to SSP. If the employee has two jobs with one employer he or she will not get SSP while he or she is off sick in only one of the jobs. However, see the guidance under Contractual Benefits, below, for commentary on National Joint Council (Green Book) terms and conditions.

Statutory Maternity and Adoption Pay

If an employee has two or more separate contracts with an authority at the same time, they may have two or more entitlements to Statutory Maternity Pay (SMP) or Statutory Adoption Pay (SAP). If, in accordance with authorisation from HMRC, the authority pays its NICs separately under each contract, then the employee is entitled to SMP or SAP under each contract. This means that there could be a different Maternity or Adoption Pay Period for each contract. It is also possible that they would be entitled to SMP or SAP under one contract and not the other if they do not meet the lower earnings limit in a particular post.

If, however, the authority aggregates its payment of NICs for the employee, then the contracts of employment are effectively combined for statutory pay purposes and only one entitlement arises. The employee would have to stop working under all contracts before they could start to receive their SMP or SAP (subject to taking Keeping in Touch days).

Issues arising under the Working Time Regulations

Working time leave

Under the Working Time Regulations, an employee is entitled to 4 weeks' paid annual leave per year (rising to 4.8 weeks in October 2007 and 5.6 weeks in October 2008). This entitlement is pro-rated for part-time employees. There is a separate entitlement for each contract. This should not cause difficulties as the pay for leave will be based on the pay for each particular contract. Separate records should be kept of the amount of leave taken under each contract as these will not necessarily coincide, for example, if a day's leave is taken when an employee was due to work under one contract, but not the other.

Maximum working time

The total hours worked under separate contracts will be added together to calculate working time. Where an employee is working more than an average of 48 hours a week the authority should consult with the employee to reduce the hours in one or more jobs, or ask them to sign an individual opt-out agreement.

Daily and weekly rest

Authorities should remember that a worker should normally (unless an exception or collective agreement applies) receive 11 hours daily rest and 24 hours weekly rest. They should ensure that the fact that the employee is employed in more than one job does not mean that they cannot take their rest entitlements.

5 Disciplinary issues

The effect of being disciplined in one job for an employee who is employed under multiple contracts with a local authority is unclear. The basic position that the contracts are treated separately remains the same. However, other contracts may be affected if the disciplinary action results from misconduct which is relevant to those contracts. In such a case the employee's contracts could all be linked to just one disciplinary hearing. The employer must make it clear that the hearing has consequences for both jobs. This should be done at the beginning of the process so, for example, the letter calling the employee to the hearing should state that any disciplinary action that may be taken would apply to both jobs.

If the employee faces an allegation of gross misconduct an alternative approach would be for the employer to have the disciplinary hearing for one contract and, if this resulted in dismissal, consider dismissal under the other contract if the misconduct is severe enough for 'some other substantial reason', most likely being that there had been a breakdown in trust and confidence.

6 Pensions

Under the LGPS Regulations 1997, where an employee is employed under more than one contract, the pension regulations will apply separately to each contract. This means that each contract is treated separately for pension contribution purposes and for the purpose of pension-benefit calculations.

7 Contractual benefits

Entitlement to a number of contractual benefits is based on length of continuous service with the employer. Part 2, paragraph 14 of the Green Book provides that for the purposes of annual leave, the occupational sickness scheme and the occupational maternity scheme continuous service will include continuous previous service with any organisation on the Modification Order. The National Joint Council advises that this should be based on the whole record of continuous service so that, if there were concurrent contracts with the authority, they would not be treated separately.

Annual leave and sick pay scheme

However, in terms of the practical provision of benefits for the purposes annual leave and sick leave each contract should be treated separately. For occupational sick pay this means that days absent due to sickness in one job will not reduce the entitlement for the other job if the employee was not due to work on that day. Clearly this only applies to occasional days absent – if the employee was signed off for a week this would reduce both entitlements. Each entitlement would be reduced by the number of working days absent under each separate

contract. For annual leave separate records should be kept of the amount of leave taken under each contract as they will not necessarily coincide.

Occupational maternity pay

In most cases, the fact that an employee has two or more separate contracts with an authority will not cause any significant problems as far as occupational maternity pay (OMP) is concerned. For ease of administering the scheme, the earnings from all the contracts would probably be combined in the same way as they will in most cases for SMP purposes. However, one issue that may arise is if an employee decides not to return to one of her jobs. To keep the half pay element of OMP a woman must return to 'local authority employment' for at least 3 months (paragraph 11.5(b)(iv) of Part Two of the Green Book). In this situation, to treat the contracts separately and argue that she has not fulfilled this requirement in respect of that contract could amount to discrimination under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. This is due to the fact that a woman who works full-time can reduce her hours, for example to two and a half days a week, and would be able to keep her occupational maternity pay. However, a woman who had two part-time jobs and who had to resign from one to reduce her hours by half would be treated less favourably if she was asked to repay the occupational maternity pay she had received under that contract. Therefore, in this situation the two contracts should not be treated separately and the woman, provided she returns to local authority employment, should be treated as having complied with the Green Book requirements.

This approach is also consistent with the general flexibility allowed by the requirement to return to local authority employment, as this means that a woman does not have to return to her old job or even to her previous authority to keep her half pay provided she returns to another local authority for 3 months.

8 Sources of Information

HM Revenue and Customs guidance:

Statutory Sick Pay: www.hmrc.gov.uk/employers/tmastatutory-sick-pay.shtml

Statutory Maternity Pay: www.hmrc.gov.uk/employers/tmastatutory-maternity-paternity-pay.shtml

Statutory Adoption Pay: www.hmrc.gov.uk/employers/tmastatutory-adoption-paternity-pay.shtml

DTI guidance:

Maternity, Adoption and Parental Leave:

www.dti.gov.uk/employment/workandfamilies/index.html

LGE website:

www.lge.gov.uk