

DRAFTING AND MANAGING EMPLOYMENT CONTRACTS



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CONTRACT OF EMPLOYMENT

- A contract of employment → agreement between an employer and an individual employee that is enforceable in a court of law.
- Employer's End → provide paid work to the employee
- Employee's End → provide labour in the service of the employer.
- Terms of Contract Agreed → orally or written in a formal document
- Letter of Appointment → Spells out terms of contract agreed with the employee and seeks written confirmation from employee of the same. In the event of a dispute, while oral terms are enforceable by courts, it will be a difficult task for the employer to prove the exact agreement.

TYPES OF EMPLOYMENT CONTRACTS

- Part time basis
- Casual workers
- Fixed term contracts
- Apprenticeship/Probations
- Temporary workers

CONTRACT FOR SERVICE vs. CONTRACT OF SERVICE

Contract of Service

a contract under which a person is engaged in the service of an employer to do such work as is contracted for and where the employer directs what it is to be done

Recourse available under S.20 IRA 1967

Contract for Service

a contractual arrangement by which one person agrees to provide workplace services to another. The contract is between two principals and neither is the employer or the employee of the other. The person providing the services is an independent contractor

No recourse under S.20 IRA 1967

If an employer decides to outsource work to independent contractors, the contract must be carefully drafted to ensure that the workers concerned are indeed independent. Such contracts for service may be challenged by the workers at the courts and the employers run the risk of the courts deciding that the workers were in fact employees and thus entitled to recourse under the IRA 1967. The cost implications for an employer in this situation are serious indeed.

‘WORKMAN’-SECTION 2 IRA 1967

“WORKMAN” means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

IS THE CLAIMANT A WORKMAN UNDER S.2 IRA 1967?

***Hoh Kiang Ngan V. Mahkamah Perusahaan Malaysia &
Anor. [1996] 4 CLJ 687***

Where it is necessary to determine whether a contract is one of service or for service, the degree of control which an employer exercises over a claimant is an important factor, although not the sole criterion. The terms of the contract between the parties must first be ascertained to determine the nature of the claimant's duties and functions. However, in a majority of cases, there are facts which show the nature, degree and extent of control, and these include the conduct of the parties at all relevant times.

PROBATIONERS

Allows Employers to subject employees to a period of 'trial' prior to confirmation

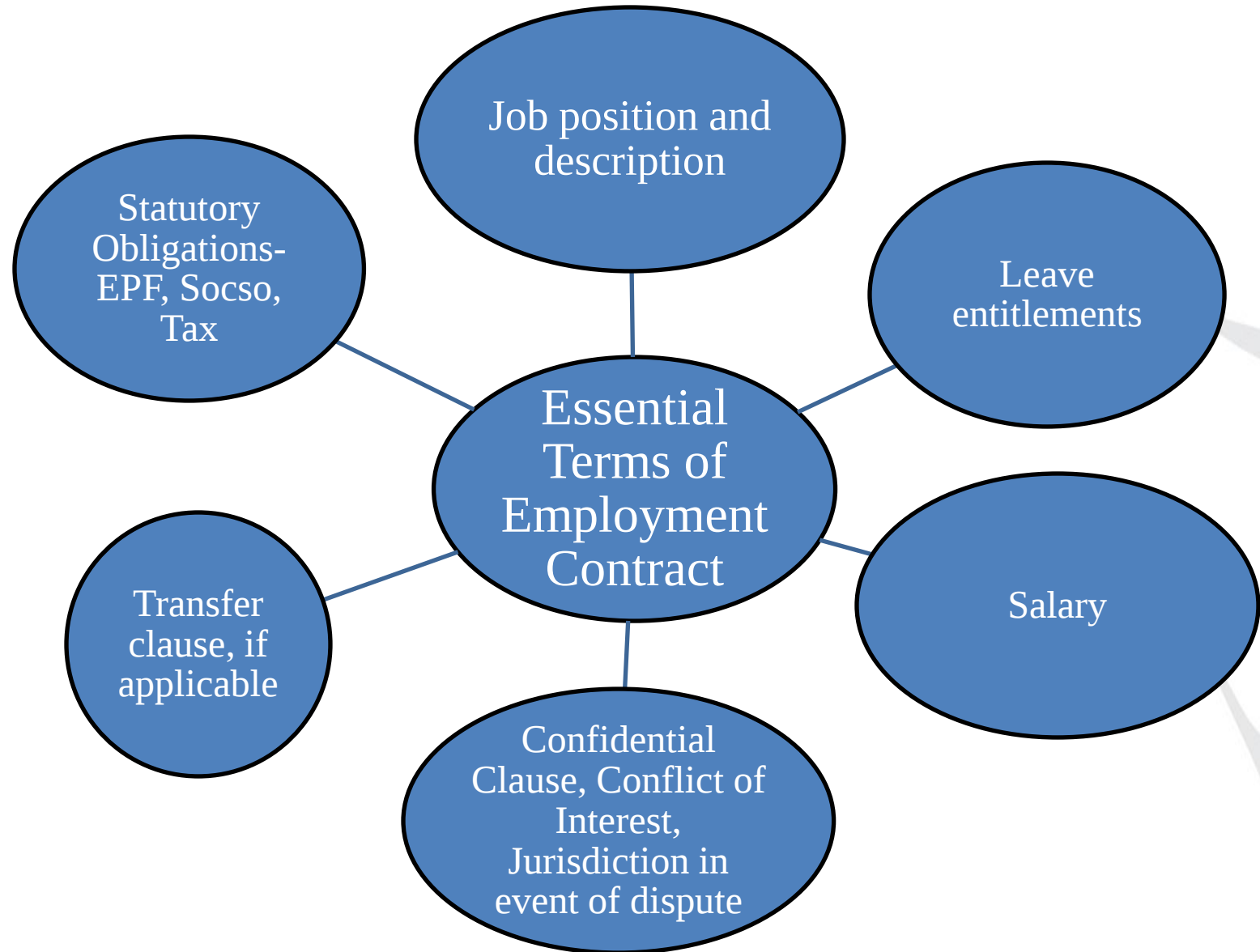
Regarded as "workman" and may lodge representations for wrongful dismissal under S.20 IRA 1967

Test: Has employee performed functions to satisfaction of employer?

No element of *mala fide*

Panorama Vacation Club Sdn Bhd v Fadzilaj Mohamed Nor [1997] 1 ILR 227

- The Industrial Court has held that employment of a person on probation does not give the employer a right to terminate the contract at its absolute discretion. Even at common law the employer's right to terminate the contract during probationary period depended on the employer being reasonably satisfied as to the unsuitability of the employee.
- A temporary worker is entitled to protection against dismissal without just cause or excuse



SECTION 28 CONTRACTS ACT 1950

***“Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extend void.*”**

Exception 1 : One who sells goodwill of a business may agree with the buyer to refrain carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein.

Provided that such limits appear to the court reasonable, regard being had to the nature of the business.

Exception 2 : Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in exception 1.

Exception 3 : Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

NON-COMPETITION CLAUSES

THOMAS MARSHALL (EXPORTS) v GUINLE
[1978] 3 AER 193, per Megarry VC

“The case is not one, of course, in which the company seeks to restrain the defendant from engaging in any competing work, but one in which the company merely seeks restraints in terms of what I have called the soliciting order and the breach of confidence order”

Non-Competition Clause :

“You hereby covenant, agree and undertake to the Company that, for a period of 12 calendar months after termination of your contract of employment with the Company (for whatever reason), you shall refrain from accepting and being retained in employment with, or providing services to (whether for your own account or for the account of any other person), any person, firm, company or organization engaged in, or carrying on, business(es) or service(s) directly in competition with or similar to the businesses of the Company”

“Not at anytime during the period of his appointment or after the termination thereof to disclose any confidential information relating to the affairs of the customers or trade secrets of the Group of which he shall become possessed whilst in the service of the Company under this or any other agreement.”

“During the period of his appointment, he shall not save with the consent in writing of the Company, be directly or indirectly engaged concerned or interested in any other business save that of the Company...” [THOMAS MARSHALL v. GUINLE [2004] 1 SLR 118]

I N Newman Ltd v. Richard T Adlem [2006] FSR 16

➤ As against the world at large, the effect of an assignment of goodwill with the business to which it relates is to put the assignee in the position formerly enjoyed by the assignor, notwithstanding that the public may to some extent have associated the business assigned with the former personality (*Wadlow's Law of Passing Off*, 3rd Edition)

➤ Once the respondent had assigned the goodwill in the funeral business, it was not open to him after the expiry of the **restrictive covenant** to start a fresh business under exactly the same name without more. He was under a duty to make absolutely clear that the two businesses were distinct. Unless he did so, he would be bound to cause a substantial number of people to believe that he was conducting the original business when in fact that was not so. Having sold the goodwill, the respondent was under a duty not to undermine it. He could compete lawfully after the expiry of the covenant but had to take particular care in how he used his own name.

CONFIDENTIALITY CLAUSES

ELECTRO CAD AUST PTY LTD v MEJATI

[1998] 3 CLJ Supp 196, per Justice RK Nathan;

*“Confidential information is generally information which is the object of an obligation of confidence and is used to cover all information of a confidential character. This includes... **Trade secrets, Literary and Artistic secrets, Personal secrets and Public and government secrets..**”*

~**THANK YOU**~



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