



HR Bulletin

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Department for Transport v Sparks

The most common answer I give to an employment law question is 'well, it depends. What does the contract say?' That's not a total cop-out; it reflects the fact that employment relationships are built on a contract between employer and employee and that the contract is the first place to look when deciding what the obligations of the parties are.

When I talk about a contract, however, I am not usually talking about a single written document signed by the parties. A contract is a legally binding agreement and the agreement between an employer and an employee is usually found not just in the written statement of terms and conditions but also in other documents – particularly the employee handbook. There are also lots of implied terms that aren't written down anywhere – but that's another story.

While an employee handbook usually sets out lots of contractual terms, not everything in it will be contractual. Some parts of the handbook will merely set out procedures that the employer currently has in place, or give administrative information about working for the employer. It is crucial, however, to be clear about what aspects of the handbook are contractual and what aren't. Since a contract is a legally binding agreement, an employer is bound to abide by a contractual term until the employee agrees to change it. If a policy is not contractual then the employer is generally able – subject perhaps to some implied terms – to replace it with another policy without the need for an agreement.

The consequences of being unclear about what is and isn't part of the contract are shown by the case of **Department for Transport v Sparks**¹, decided recently by the Court of Appeal. In that case, the employee handbook set out a detailed absence management procedure to be used when an employee's periodic short-term absences became a problem. However the handbook specifically provided that the policy would not be invoked until the employee's absences reached the 'trigger point' of 21 days. The employer sought to amend this threshold without reaching an agreement on the point, but was challenged in the High Court by the employees' trade union. The High Court granted an injunction preventing the change from taking place and the Court of Appeal upheld that ruling.

The key issue was whether the 21 day trigger was a contractual term or simply part of a non-contractual procedure. The employer pointed to the earlier case of *Wandsworth LBC v D'Silva*² in which the Court of Appeal held that a sickness absence policy was not contractual.

¹ [2016] EWCA Civ 360

² [1988] IRLR 193

The Court in that case said that it was desirable for such policies to be flexible and operated with compassion and common sense, rather than being treated as part of the contractual obligations of the parties. On this basis the employer argued that the policy was not 'apt' for incorporation into the contract of employment.

The Court of Appeal disagreed. The fact that it was desirable for absence management policies to be non-contractual did not outweigh the contractual language used in the handbook. In a case dealing with a redundancy policy – *Keeley v Fosroc International Ltd*³ – the Court of Appeal had held that 'the fact that the staff handbook was presented as a collection of 'policies' does not preclude their having contractual effect if, by their nature and language they are apt to be contractual'.

The problem for the Department of Transport was that the language used in the employee handbook was the 'language of entitlement'. The chapter on sickness absence began with the phrase 'this chapter sets out your terms and conditions of employment relating to sick leave' so it was a bit difficult to argue that what followed was not part of the employee's terms and conditions. It then mentioned the 21 day trigger point and said 'Only if you have exceeded these 'trigger points' and... will [your manager] take the matter forward in accordance [with] the procedures set out in Annex A'.

The Court of Appeal held that the employer had given employees a contractual right not to be subjected to the absence management procedure until the trigger point had been reached. As this was contractual the employer did not have the right to change the trigger point without agreement.

The employer's problem could have been avoided in two ways. Either the policy could have included a general right to amend the trigger point, or it could have been phrased in such a way as to make it clear that the trigger level was not part of the contract.

If, for example, instead of saying 'this policy sets out terms and conditions' it had simply said 'this policy sets out [the employer's] approach to managing sickness absence' it would have been much harder for the Court to find that the trigger levels were contractual. Similarly if the handbook had said that the procedure would 'usually' not be applied unless the trigger point had been reached – or if had said that the trigger point is 'currently set at 21 days' – it would have been clear that the employer had a discretion to apply the policy flexibly or change the trigger point altogether. Less subtly of course, the handbook could have included a paragraph under which the employer reserved the right to change any aspect of the policy – including the trigger point – or which specifically stated that the trigger point was not part of the contract of employment.

In a non-unionised environment, using this sort of phrasing is straightforward. I regularly see handbooks that make it clear that the employer isn't really bound by anything they contain, to the point that it hardly seems worth having them. When policies and procedures have to be negotiated with a trade union on the other hand, the language of entitlement can be difficult to avoid. Unions are likely to be alert to language that gives the employer 'wriggle room' to go back on assurances given in a negotiation.

At the very least, however, a handbook should be clear about what is and what is not contractual and employers should be careful not to let careless wording give rise to unwanted contractual obligations. A discretion to adapt policies to meet special cases and changing circumstances is something worth negotiating for.

Keep in Touch

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³ [2006] EWCA Civ 1277



Quirky Questions?

Recruitment techniques are becoming more creative where employers really want to get under the skin of their candidates. What makes people tick? How can employers ensure that they are recruiting the behaviours that match their culture and mix?

A number of blue chip companies have incorporated bizarre interview questions to distinguish these key qualities shifting away from the usual competency based questions.

From personal to historic, the questions aim to gauge a deeper understanding of the candidate in the interview setting - showing that candidate preparation can sometimes come down to simply ensuring an interviewee is ready for anything.

Some of the most probing questions from CEOs include:

- **What did you learn from your Mum?**
- **What century was the French Revolution in?**
- **What magazines and books have you read recently?**
- **If you failed at this job in your first 90 days, what things wouldn't you be doing well?**
- **How can I tell if you're having a bad day, and how does that manifest itself?**

Time for a bit of fun ☺ WME have created an **anonymous** survey to capture the answers to these quirky questions.

You are therefore challenged to take part in this survey to see whether you will be hired or fired!

Your answers will be scored out of 5 for being the most entertaining; so the best ones will be published in next month's bulletin.

There is a method in the madness so we will also share with you what the responses tell an employer about you.

To take part, copy and paste the link below into your browser.

<https://www.surveymonkey.co.uk/r/hrhowlers>

Happy Applying!





FREE: Learning Workshops

Join us on **7th July** where we are pleased to launch our refreshed **Resilience offer in the morning** and **360 degree feedback serviced in the afternoon**. You can attend the whole day, or just the am or pm session

Date: 7th July 2016 10am till 3:00pm
Venue: The Impact Hub, Birmingham
Lunch: included for those attending the whole day

This event is for all managers and senior HR or OD professionals who are supporting organisations deliver transformation and change initiatives.

Change: Using Resilience as the Vehicle in a VUCA World – 10am until 12:30pm

Increasingly local authorities are operating in a VUCA world i.e. one that is volatile, uncertain, complex and ambiguous. Reducing resources require local authorities to be able to cope with increasing workloads, to think differently about how services might be offered, to generate income to enable services to survive. In other words, to be flexible and adaptable in a VUCA world.

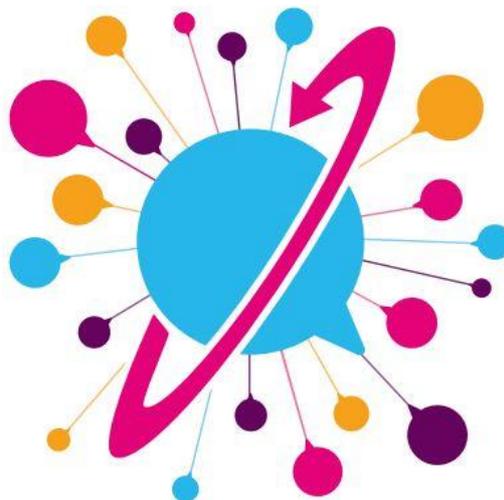


This event is designed to give you:

- The latest thinking on resilience, engagement and corporate happiness
- Round table discussions on what this can mean for your organisation.
- An illustrative case study from Telford & Wrekin Council
- Opportunity to share best practice and network.

360 Feedback so much more than a questionnaire – 1.00pm until 3.00pm

GPS systems require four different satellites to get an accurate picture of your location. As employees we need multiple perspectives to gain an accurate picture of our effectiveness.



This session is designed to help you think about:

- **When is it the right time?**
Knowing when individuals and organisations are ready to undertake 360
- **Essential ingredients to 360 success**
What you need to put in place to gain the greatest value for your organisation
- **What is involved in making it happen?**
Practical top tips and an introduction to how WME's online 360 system can support you
- **Reaping the benefits**
Examples of how others have used and benefitted from 360 feedback to support ongoing

Book Now

<https://www.surveymonkey.co.uk/r/WME7thJuly>